

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 165

MAX LERNER, APPELLANT,

vs.

HUGH J. CASEY, WILLIAM G. FULLEN,
HARRIS J. KLEIN, ET AL.

APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK

	Original	Print
Proceedings in the Supreme Court of the State of New York		
Statement under Rule 234	1	1
Order of the Supreme Court of New York, County of Kings, appealed from	3	2
Notice of motion	6	4
Petition, read in support of motion	9	5
Petitioner's Exhibit I—Letter from New York City Transit Authority to Max Lerner, dated October 21, 1954, with attachment	15	10
Petitioner's Exhibit II—Letter from New York City Transit Authority to Max Lerner, dated November 24, 1954, with attachment	19	13
Notice of cross-motion	23	16
Opinion, Brenner, J.	25	17
Notice appeal to the Appellate Division	40	27
Notice of appeal to Court of Appeals	42	28
Order of affirmance of Appellate Division	45	30
Opinion of Appellate Division, Ughetta, J.	47	31
Dissenting opinion, Beldock, J.	68	46
Order of Court of Appeals granting leave to New York Civil Liberties Union to file amicus curiae brief	74	50
Opinion of Court of Appeals, Conway, C. J.	75	50
Dissenting opinion, Fuld, J.	86	64
Opinion, Van Voorhis, J., concurring in part with Fuld, J.	91	70
Remittitur	92	71
Judgment of Supreme Court on remittitur	96	72
Notice of appeal to the Supreme Court of the United States	98	73
Order postponing jurisdiction	103	76
Order granting motion for leave to proceed in forma pauperis	105	77

1 **IN NEW YORK SUPREME COURT
OF THE STATE OF NEW YORK**

In the Matter of the Application of

MAX LERNER, *Petitioner-Appellant,*

**for an Order under Article 78 of the
Civil Practice Act,**

against

**HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN,
HENRY K. NORTON and DOUGLAS M. MOFFAT, constituting
the New York City Transit Authority, *Respondents.***

Statement Under Rule 234

This proceeding under Article 78 of the Civil Practice Act was commenced by the service of a notice of motion, verified petition and exhibits on or about December 10th, 1954. A notice of cross-motion was served by the respondents on December 15th, 1954.

The order of the Supreme Court appealed from, denying petitioner's application and granting respondents' cross-motion, was entered on the 29th day of January, 1955. Notice of Appeal to the Appellate Division, Second Department, was served on February 8th, 1955. That Court rendered the decision affirming the order below on June 25, 1956. Notice of appeal to this Court was served and filed on August 17, 1956.

2 The full names of the original parties are as above set forth. There has been no change of parties herein, except for changes in the composition of the membership of the Transit Authority.

The name of the attorney for the petitioner is Leonard B. Boudin, office and post-office address, No. 25 Broad Street, Borough of Manhattan, City of New York. The name of the respondents' attorney is Daniel T. Scannell, office and post-office address, No. 370 Jay Street, Borough of Brooklyn, City of New York. Mr. Scannell, who appeared for the respondents in the Court below, has succeeded Harold L. Warner, who first appeared for respondents, as General Counsel of the Transit Authority. Jacob K. Javits, Attorney-General of the State of New York, by James O.

Moore, Jr., Solicitor General, and Ruth Kessler Toch, Assistant Attorney-General, submitted briefs, pursuant to Executive Law, Sec. 71.

3 IN SUPREME COURT OF NEW YORK,
KINGS COUNTY

Order Appealed From—Jan. 28, 1955

Present:

HON. BENJAMIN BRENNER, *Justice*.

4 The petitioner above named having moved this Court, pursuant to Article 78 of the Civil Practice Act, for an order directing that the petitioner be reinstated and restored to his position as Conductor by the New York City Transit Authority with full pay as of October 21, 1954, and that petitioner be restored to full rights as an employee of the said New York City Transit Authority, and for a further order declaring any investigation of petitioner by the Commissioner of Investigation of The City of New York to have been beyond the power of said Commissioner of Investigation and illegal, null and void, and for a further order declaring petitioner's suspension by the New York City Transit Authority on or about October 21, 1954, and his subsequent discharge by said Authority on or about November 24, 1954, to be invalid and illegal as being contrary to statute and contrary to the Constitution of New York State and the Constitution of the United States, all after a review of the determination and decisions of the New York City Transit Authority in suspending and discharging petitioner, to the end that the determinations and decisions of said New York City Transit Authority be reviewed and corrected on the merits by the Court, and all errors committed in suspending and discharging petitioner be corrected pursuant to law, and the respondents having made a cross-motion herein for an order pursuant to Section 1293 of the Civil Practice Act dismissing the petition herein on the ground that it does not state facts sufficient to entitle the petitioner to be

relief prayed for, or to any part thereof, or to any other relief, and on the ground that such petition is insufficient as a matter of law, and said motion and cross-motion having duly come on to be heard on the 21st day of December, 1954;

Now, on reading the notice of motion dated December 10, 1954, the petition and affidavit of Max Lerner annexed thereto verified December 9, 1954, and petitioner's Exhibits I and II, also annexed thereto, and respondents' notice of motion to dismiss the petition, dated December 14, 1954, and after hearing Leonard B. Boudin, Esq., attorney for petitioner, in support of petitioner's application and in opposition to respondents' motion to dismiss, and Harold L. Warner, Esq., attorney for respondents, in support of respondents' motion to dismiss and in opposition to petitioner's application, and Jacob K. Javits, Esq., Attorney General of the State of New York, by Henry S. Manley, Solicitor General, and Ruth Kessler Toch, Assistant Attorney-General, having submitted a memorandum pursuant to Executive Law, Section 71, in support of the constitutionality of Chapter 14 of the Unconsolidated Laws of the State of New York, and due deliberation having been had, and the Court having rendered its decision, and on filing the opinion of the Court; On motion of Harold L. Warner, Esq., attorney for respondents, it is

ORDERED, that the petitioner's application be and the same hereby is denied; and it is

FURTHER ORDERED, that the motion of the respondents to dismiss the petition herein be and the same hereby is granted and the petition herein and this proceeding are hereby dismissed.

Enter,

BRENNER,
J. S. C.

Granted:

Jan. 28, 1955,

FRANCIS J. SINNOTT.

6 IN SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

Notice of Motion—Dec. 10, 1954

Sirs:

PLEASE TAKE NOTICE that upon the annexed petition of Max Lerner, duly verified the 9th day of December, 1954, the undersigned, pursuant to Article 78 of the Civil Practice Act will move this Court at a Special Term, Part I thereof, to be held in and for the County of Kings at the Municipal Building, Court and Joralemon Streets, in the Borough of Brooklyn, City and State of New York, on the 21st day of December, 1954 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order directing that petitioner be reinstated and restored to his position as Conductor by the New York City Transit Authority with full pay as of October 21, 1954, and that petitioner be restored to full rights as an employee of the said New York City Transit Authority, and for a further order declaring any investigation of petitioner by the Commissioner of Investigation of the City of New York to have been beyond the power of said Commissioner of Investigation and illegal, null and void, and for a further order declaring petitioner's suspension by the New York City Transit Authority on or about October 21, 1954, and his subsequent discharge by said Authority on or about November 24, 1954, to be invalid and illegal as being contrary to statute and contrary to the Constitution of New York State and the Constitution of the United States, all after a review of the determinations and decisions of the New York City Transit Authority in suspending and discharging petitioner, to the end that the determinations and decisions of said New York City Transit Authority be reviewed and corrected on the merits by this Court, and all errors committed in suspending and discharging petitioner may be corrected pursuant to law, and for such other and further relief as may be just and proper in the premises.

PLEASE TAKE FURTHER NOTICE that pursuant to Section 1291 of the Civil Practice Act, you are required to serve,

at least two days prior to the return date, a verified answer annexing thereto the certified transcript of the record of the proceedings subject to this review and any and all affidavits or other written proof to be used herein.

Dated: New York, N. Y., December 10, 1954.

8

Yours, etc.,

LEONARD B. BOUDIN, Esq.,
Attorney for Petitioner.

To:

HUGH J. CASEY,
WILLIAM G. FULLEN,
HARRIS J. KLEIN,
HENRY K. NORTON,
DOUGLAS M. MOFFAT,
constituting the New York City
Transit Authority,
370 Jay Street,
Brooklyn, New York.

9

IN SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

Petition. Read in Support of Motion

To the Supreme Court of the State of New York:

The petition of Max Lerner respectfully shows:

1. Petitioner is a citizen of the United States and a resident of the Borough of Bronx, City and State of New York. He brings this proceeding, pursuant to Article 78 of the Civil Practice Act, on his own behalf against the New York City Transit Authority, herein called the "Transit Authority", as a former employee of said Transit Authority.

2. Respondents, Hugh J. Casey, William G. Fullen, Harris J. Klein, Henry K. Norton and Douglas M. Moffat, are members of the Transit Authority, a public benefit

corporation organized pursuant to Chapter 200, Laws of 1953, *Public Authorities Law*, Title 15, Section 1800 *et seq.*, to acquire and operate the transit facilities formerly operated by the Board of Transportation of the City of New York, herein called the "Board". The principal offices of the Transit Authority are located at 370 Jay Street, Borough of Brooklyn, County of Kings, City and State of New York.

3. Subsequent to the enactment of the foregoing legislation, the Transit Authority upon information and
10 belief, did acquire and operate the transit facilities of the City of New York. Pursuant to Section 1810, *Public Authorities Law*, petitioner and all other employees of the Board became employees of the Transit Authority subject to the provisions of the Civil Service Law. From on or about November 1, 1935, until his suspension on or about October 21, 1954, petitioner was continuously employed in the Transit System of New York City. The facts concerning petitioner's suspension and subsequent dismissal on or about November 24, 1954 from his position as "Conductor" are more specifically set forth below. Petitioner's last assignment was that of Conductor on the Independent Division of the subway system; his primary duties consisted of opening and closing subway car doors to permit the entrance and exit of passengers together with certain routine duties incidental thereto.

4. Petitioner's service, as an employee, has at all times been deemed satisfactory by the Transit Authority and its predecessors who employed petitioner. At no time prior to October 21, 1954, was petitioner ever suspended, discharged, nor did petitioner at any time sustain any loss of pay as a disciplinary measure. Indeed, petitioner's service has been marked by the award of a commendation for having
saved the life of a person whom petitioner, at one time, discovered on the subway tracks.

5. On September 14, 1954, petitioner, pursuant to oral
instructions from his immediate supervisor on the previous
day, appeared at the office of the Commissioner of In-
11 vestigation of the City of New York. Petitioner was received by a Deputy Commissioner, upon information and belief, Mr. O'Connor, who advised petitioner that

petitioner was there for the purpose of answering questions in an investigation being conducted by that office. Mr. O'Connor further advised petitioner that unless petitioner answered all questions fully, petitioner would be subject to dismissal from his job in accordance with the provisions of Section 903 of the New York City Charter.

6. Thereupon, petitioner was sworn. After one or two preliminary questions intended to identify petitioner, petitioner was asked a series of questions concerning his political affiliations which, relying upon his constitutional privilege, petitioner declined to answer. Said hearing was then and thereafter adjourned.

7. Subsequently, on two different adjourned dates, September 30, 1954 and October 8, 1954, petitioner appeared with counsel and was advised that the Mayor of the City of New York had authorized the Commissioner of Investigation to inquire into the employment of certain persons in specifically enumerated agencies among which was included the Transit Authority and that said inquiry was to be conducted in conformity with the Security Risk Law, Chapter 233, Laws of 1951. The Commissioner's Deputy declined to state, upon inquiry by counsel, whether charges of any nature had been made against petitioner. On October 8, 1954, petitioner was again sworn and reiterated his refusal to answer for the same reasons stated above.

12 8. On October 21, 1954, petitioner was suspended by the Transit Authority on the grounds that he had invoked his constitutional privilege in refusing to answer the questions of the Commissioner of Investigation of the City of New York. A photostatic copy of the Transit Authority's resolution of suspension and letter of transmittal is annexed hereto as petitioner's "Exhibit I". In said letter of transmittal, petitioner was given thirty days within which to file affidavits or statements. The clear purpose of the statutory provision affording the right to file statements or affidavits was to enable a person, situated as this petitioner, to answer, rebut or explain mitigating circumstances of any charges against him. No charge of any nature appears in said letter of transmittal and resolution of suspension other than the statement that petitioner had invoked his constitutional privilege before

the Commissioner of Investigation. In the absence of charges of misconduct or wrongdoing, petitioner submitted no affidavits or statements. There is no dispute as to the assertion of constitutional privilege by petitioner.

9. On or about November 24, 1954, petitioner was discharged from his position as Conductor by the Transit Authority. A photostatic copy of the letter of Transmittal and the resolution of discharge is annexed hereto as petitioner's "Exhibit II".

10. The Commissioner of Investigation was without authority to conduct an inquiry into employees of the Transit Authority. Petitioner, and all other transit employees, at all times hereinabove set forth, was an employee of the Transit Authority and not of the City of New York. The powers of the Commissioner of Investigation do not include the authority to investigate employees of a non-city agency under the circumstances herein set forth.

11. Since the inquiry conducted by the Commissioner of Investigation was illegal, null and void, the purported proceeding conducted by the Commissioner of Investigation cannot be made the basis for disciplinary action by the Transit Authority.

12. Although purporting to act pursuant to the Security Risk Law, the Transit Authority has failed to conduct a proper investigation or inquiry in compliance therewith. Attempted delegation of its obligation to investigate or inquire to the Commissioner of Investigation of the City of New York was ineffective in view of the fact that the power of the Commissioner of Investigation to investigate was at all times limited by the New York City Charter to matters concerning agencies of the City of New York.

13. The Security Risk Law is unconstitutional in that as written and as applied it is inconsistent with procedural due process. The charges which may be made thereunder are necessarily vague and indefinite. The standards set forth therein are similarly vague and indefinite. It provides for the consideration of secret evidence and deprives one affected thereby of the opportunity to be confronted

by witnesses or to rebut unfavorable testimony. The
 14 Security Risk Law is further unconstitutional in that,
 as written and as applied herein, it acts to deprive
 of substantive due process. Assertion of a constitutional
 privilege cannot be grounds for discharge from employ-
 ment.

14. Petitioner has been denied the rights accorded him
 under Section 22 of the Civil Service Law. Petitioner did
 not receive written notice of proposed removal. Peti-
 tioner did not receive any statement of charges against
 him. Petitioner was not given a reasonable opportunity
 to answer any charges as provided by said law.

WHEREFORE, petitioner respectfully prays that an order
 be granted declaring said investigation by the Commissioner
 of Investigation, to be beyond the power of said Commis-
 sioner of Investigation, illegal, null and void, and declaring
 that petitioner's suspension and discharge as set forth were
 invalid, contrary to statute and contrary to the State and
 Federal constitutions; directing that petitioner be rein-
 stated to his position as Conductor with full pay as of
 October 21, 1954, and be restored to full rights as an em-
 ployee of the Transit Authority, and for such other and
 further relief as may be just and proper in the premises.

Dated: New York, N. Y., December 9, 1954.

MAX LERNER,
 Petitioner.

(Duly verified December 9, 1954.)

Petitioner's Exhibit I to Petition**NEW YORK CITY TRANSIT AUTHORITY****370 JAY STREET****BROOKLYN 1, N. Y.****Telephone ULster 2-5000**

Refer to 402-W

October 21, 1954

Max Lerner
220 Miriam Street
Bronx 58, N. Y.

Dear Sir:

You are hereby notified that the New York City Transit Authority has found after proper investigation and inquiry, that upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, your employment in the position of Conductor will endanger the security or defense of the nation and state. Therefore, the Authority, pursuant to Section 1105 of the Unconsolidated Laws of the State of New York (L. 1951, C. 233, subd. 5), has suspended you from such position, without pay, effective at the close of business on October 22, 1954. A certified copy of the resolution suspending you is enclosed.

This action has been taken because on September 14, 1954, when testifying under oath at the office of the Commissioner of Investigation of The City of New York, you refused to answer questions as to whether you were then a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the United States. Furthermore, having been advised of the provisions of the Security Risk Law (L. 1951, C. 233, as amended), and
16 after having been given an opportunity to reconsider your refusal, and having been given a postponement from September 21 to September 30, 1954, to engage counsel, and a further adjournment at the request of your counsel from September 30 to October 8, 1954, you appeared with counsel on the latter date and again refused to answer questions as to whether you were then or had been a member of the Communist Party and again invoked the Fifth Amendment to the Constitution of the United States.

You have the opportunity, within thirty days after this notification, to submit statements or affidavits to show why you should be reinstated or restored to duty.

You will be notified of any further action by the Authority in this matter.

Very truly yours,

S. H. BINGHAM,
*Executive Director and
General Manager.*

WHEREAS, the Department of Investigation of The City of New York has furnished this Authority with a copy of its Report No. MR-10951(D), dated October 11, 1954, from which it appears that Max Lerner, Conductor, Pass No. 23-3592, in the employ of this Authority, in testifying under oath before said Department of Investigation on September 14, 1954, refused to answer questions as to whether or not he was a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the

17 United States, and that after being advised of the provisions of the Security Risk Law (L. 1951, C. 233, as amended), and being given an opportunity to reconsider his refusal, he appeared at the office of the Department of Investigation on September 21, 1954, at which time he requested additional time to engage counsel, and that on September 30, 1954, he appeared, accompanied by counsel, who requested and was granted a further adjournment, and it further appears that on October 8, 1954, said Max Lerner appeared with counsel and again refused to answer questions as to whether he was then or had been a member of the Communist Party, and again invoked the Fifth Amendment to the Constitution of the United States; and

WHEREAS, this Authority has found, after due investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of his doubtful trust and reliability, the employment of Max Lerner in the position of Conductor would endanger the security or defense of the nation and the state;

RESOLVED, that Max Lerner, Conductor, be and he hereby is suspended without pay effective at the close of business on October 22, 1954;

FURTHER RESOLVED, that a certified copy of this resolution be delivered to said Max Lerner, either in person or by registered mail, with notice of his suspension and the reasons therefor;

FURTHER RESOLVED, that at any time within thirty days after delivery to said Max Lerner of such notice, he may submit statements or affidavits to show why he should be reinstated or restored to duty;

FURTHER RESOLVED, that the Executive Director and General Manager be directed to conduct such further investigation and review as may be necessary in the circumstances and to report to this Authority at the expiration of thirty days from the date of notification to said Max Lerner.

NEW YORK CITY TRANSIT AUTHORITY

By WM. JEROME DALY,
Secretary.

October 21, 1954

I, Wm. Jerome Daly, Secretary of New York City Transit Authority, DO HEREBY CERTIFY, that I have compared the attached with the original adopted by the New York City Transit Authority, on October 21, 1954, and on file in the office of said Authority, and that it is a correct transcript thereof and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the seal of the New York City Transit Authority, this 21st day of October, 1954.

WM. JEROME DALY,
Secretary.

19 **Petitioner's Exhibit II to Petition****NEW YORK CITY TRANSIT AUTHORITY****370 JAY STREET****BROOKLYN 1, N. Y.****Telephone ULster 2-5000**

Refer to 402-W

November 24, 1954

Max Lerner
220 Miriam Street
Bronx 58, N. Y.

Dear Sir:

As you have been previously notified, the Authority, by resolution dated October 21, 1954, suspended you without pay, effective at the close of business on October 22, 1954. This suspension was pursuant to Section 1105 of the Unconsolidated Laws of the State of New York (L. 1951, C. 233, subd. 5), and in accordance with its provisions, you were notified of the reasons for such action, and were given a period of thirty days from notice to you of your suspension within which to submit statements or affidavits to show why you should be reinstated or restored to duty.

Although the period of thirty days has elapsed, neither you, nor any person on your behalf, has submitted any statements or affidavits to the Authority, or in any way communicated with it.

Accordingly, at its meeting on November 24, 1954, this Authority, which has been duly designated by the State Civil Service Commission as a security agency, after reviewing the entire matter, has adhered to its finding

20 that, upon all the evidence, reasonable grounds exist for belief that because of doubtful trust and reliability your employment in the position of Conductor will endanger the security or defense of the nation and the state, and therefore, pursuant to the above cited Section of the law, the Authority has terminated your employment, effective at the close of business on November 24, 1954.

A certified copy of the Authority resolution terminating

your employment is enclosed, and made a part of this notification.

Very truly yours,

S. H. BINGHAM,
*Executive Director and
General Manager.*

Encl.

WHEREAS, by resolution dated October 21, 1954, this Authority found, after due investigation and inquiry, that upon all the evidence, reasonable grounds existed for the belief that because of his doubtful trust and reliability the employment of Max Lerner, Pass No. 23-3592, in the position of Conductor, would endanger the security or defense of the nation and state, and accordingly suspended him, without pay, effective at the close of business on October 22, 1954, under the provisions of Section 1105 of the Unconsolidated Laws of the State of New York (L. 1951, C. 233, subd. 5); and

WHEREAS, the said Max Lerner, on October 22, 1954, was served with a certified copy of said resolution and with written notice that he could, at any time within 21 thirty days from the date of service of such notice, submit statements or affidavits to show why he should be reinstated or restored to duty, but he has failed to submit any such statement or affidavit; and

WHEREAS, by report dated November 22, 1954, S. H. Bingham, Executive Director and General Manager, has stated that, although the thirty-day period has elapsed, neither Max Lerner, nor anyone on his behalf, has communicated with the Authority, or with the Department of Investigation of The City of New York, and that further investigation has revealed activities on the part of Max Lerner which give reasonable ground for belief that he is not a good security risk, and has recommended that his employment be terminated; and

WHEREAS, this Authority has found, after due investigation and inquiry, and upon review, that upon all the evidence, reasonable grounds exist for belief that because of

his doubtful trust and reliability, the employment of Max Lerner in the position of Conductor endangers the security or defense of the nation and state;

RESOLVED, that, pursuant to Section 1105 of the Unconsolidated Laws of the State of New York (L. 1951, C. 233, subd. 5), the employment of Max Lerner, Conductor, is terminated effective at the close of business on November 24, 1954;

FURTHER RESOLVED, that a certified copy of this resolution be delivered to said Max Lerner, either in person or by registered mail;

22 FURTHER RESOLVED, that the Secretary be and he hereby is directed to send a copy of this resolution to the Commissioner of Investigation of The City of New York and the City and State Civil Service Commissions.

NEW YORK CITY TRANSIT AUTHORITY

By WM. JEROME DALY,
Secretary

November 24, 1954

I, WM. JEROME DALY, Secretary of NEW YORK CITY TRANSIT AUTHORITY DO HEREBY CERTIFY, that I have compared the attached with the original adopted by the New York City Transit Authority, on November 24, 1954, and on file in the office of said Authority, and that it is a correct transcript thereof and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the seal of the New York City Transit Authority, this 24th day of November, 1954.

WM. JEROME DALY,
Secretary

23 IN SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

Notice of Cross-Motion—Dec. 14, 1954

Sir:

*PLEASE TAKE NOTICE that upon the petition herein, and the papers attached thereto, the undersigned will move this Court, by way of cross-motion, at a Special Term, Part I thereof to be held in and for the County of Kings at the Municipal Building, Court and Joralemon Streets, in the Borough of Brooklyn, City and State of New York, on the 21st day of December, 1954, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Section 1293 of the Civil Practice Act dismissing the petition herein on the ground that it does not state facts sufficient to entitle the petition to the relief prayed for, or any part thereof, or to any other relief, and on the ground that such petition is insufficient as a matter of law, and for such other and further relief as to this Court shall seem just and proper.

PLEASE TAKE FURTHER NOTICE that, in the event of the denial of this cross-motion, the respondents request leave of this Court to file their answer and to annex thereto the certified transcript of the record of the proceedings had herein and any and all affidavits or other written proof to be used herein, within twenty days thereafter, pursuant to the provisions of the Civil Practice Act thereto applicable.

24

Dated: Brooklyn, N. Y., December 14, 1954.

HAROLD L. WARNER, *Attorney for Respondents*

To:

LEONARD B. BORDIN, Esq.,
Attorney for Petitioner.

25 IN SUPREME COURT OF THE STATE OF
NEW YORK

KINGS COUNTY

SPECIAL TERM—PART I

Opinion—Jan. 24, 1955

By Mr. Justice BRENNER.

Re: *Lerner v. Casey*

This is a proceeding under article 78 of the Civil Practice Act for an order directing that petitioner be reinstated and restored to his position as a conductor by the New York City Transit Authority; for a further order declaring any investigation of petitioner by the Commissioner of Investigation of the City of New York to have been beyond the power of said commissioner, illegal and void; for a further order declaring petitioner's suspension by the New York City Transit Authority on October 21, 1954, and his subsequent discharge on November 24, 1954, to be illegal as contrary to statute and contrary to the Constitution of New York State and the Constitution of the United States.

The petition alleges that petitioner has been a subway conductor in the New York City Transit System for nineteen years, most recently as an employee of respondents.

26 Respondents are members of the New York City Transit Authority, a public benefit corporation, created by chapter 200 of the Laws of 1953 as amended. The Authority operates the transit facilities owned by the City of New York.

The petition alleges further that on September 14, 1954, petitioner was directed to and did appear in the office of the Commissioner of Investigation of the City of New York, where he was advised that he would be required to answer certain questions in an investigation being conducted by that office. After being sworn, petitioner was asked whether he was then a member of the communist party. He refused to answer this question and invoked the provisions of the Fifth Amendment of the Constitution of the United States. The examination was then adjourned to September 30, 1954, for the purpose of permitting petitioner to engage counsel. A further adjournment was

granted at the request of such counsel from September 30 to October 8, 1954. Petitioner appeared with counsel on the latter date and again refused to answer questions as to whether he was then or had been a member of the communist party and again invoked the Fifth Amendment. There is no dispute that the petitioner asserted the constitutional privilege.

The resolution suspending petitioner provided, pursuant to the provisions of the Security Risk, sections 1101 to 1108, inclusive of the Unconsolidated Laws, that at any time within thirty days after delivery to petitioner of notice of suspension, petitioner might submit statements or affidavits to show why he should be reinstated or restored to duty. The executive director and general manager of the Transit Authority was also directed to conduct
27 such investigation and review as might be necessary in the circumstances and to report back to the Authority on the expiration of the thirty-day period.

It is conceded that during the ensuing thirty-day period petitioner did not submit any affidavit or statement to the respondents. Thereupon the executive director and general manager of the Authority reported to respondents that neither petitioner nor anyone on his behalf had communicated with the Authority or with the Department of Investigation of the City of New York during the thirty-day period, and also reported that further investigation revealed activities on the part of petitioner which gave reasonable grounds for the belief that he was not a good security risk and recommended that his employment be terminated. In this respect the resolution of the Authority dated November 24, 1954, annexed as an exhibit to the petition, states: "Whereas, by report dated November 22, 1954, S. H. Bingham, Executive Director and General Manager, has stated that, although the thirty-day period has elapsed, neither Max Lerner, nor anyone on his behalf, has communicated with the Authority, or with the Department of Investigation of the City of New York, and that further investigation has revealed activities on the part of Max Lerner which give reasonable ground for belief that he is not a good security risk, and has recommended that his employment be terminated: * * *"

The Authority then found upon review that upon all the evidence reasonable grounds existed for the belief that because of his doubtful trust and reliability, the employment of the petitioner in the position of conductor endangered the security and defense of the nation and state and therefore resolved, pursuant to section 1105 of the Unconsolidated Laws of the State of New York that the employment of petitioner be terminated effective November 24, 1954.

Petitioner challenges the action of the New York Transit Authority upon the following grounds: First, that the Commissioner of Investigation of the City of New York was without authority to investigate him as an employee of the Authority, a state agency; and that, since the inquiry conducted by the commissioner was illegal, null and void, it cannot be made the basis for disciplinary action by the Authority; second, that the Security Risk Law is unconstitutional as written and applied and is inconsistent with procedural due process; third, that reasonable grounds do not exist for the belief that petitioner's employment would endanger national and state security and defense; fourth, that respondents have failed to comply with the provisions of the State Civil Service Law; and fifth, that petitioner's right to seek relief under article 78 of the Civil Practice Act is guaranteed to him by section 22 of the Civil Service Law.

On the return of the petition and before the service of the answer respondents moved under section 1293 of the Civil Practice Act to dismiss the petition as a matter of law.

Respondents urge three grounds for dismissal, namely, first, that the Security Risk Laws is constitutional; second,

that the determination of the authority may not be reviewed or corrected in this article 78 proceeding;

and third, that the authority had reasonable grounds for belief that petitioner was of doubtful trust and reliability and that the authority properly considered and had the right to consider evidence brought to its attention by the Commissioner of Investigation of the City of New York.

The preamble of the Security Risk Law clearly recites that it is the intent of the Legislature that a person who is a member of a subversive organization is of doubtful

trust and reliability and that his employment in public service in a security position or in a position in a security agency would endanger the security and defense of the nation and of the state. The law defines the terms "security agency" and "security position" (sec. 1102) and provides for the determination whether an agency is a "security agency" and a position is a "security position" by the State Civil Service Commission (sec. 1103). The State Civil Service Commission has determined that the New York City Transit Authority is a "security agency." Section 1106 gives any person who believes himself aggrieved by a transfer or dismissal the right to exclusive appeal to the State Civil Service Commission.

The first question for determination here is whether the Security Risk Law, particularly section 1105 of the Unconsolidated Laws, is constitutional. Of course, a statute is presumed to be constitutional and the court may not declare it unconstitutional unless it is clearly so. If there is any doubt the expressed will of the Legislature should be upheld (*Munn v. Illinois*, 94 U. S., 113, 123, see also *Matter of Fay*, 291 N. Y., 198, 207).

30. It is also settled law that public employment is not a right but a privilege. The Legislature is free to impose reasonable restrictions upon the activities of employees as conditions of and part of the terms of their employment. Petitioner, as a civil servant, had no vested right in, or contract right to, his position and the Legislature therefore could say at any time upon what terms and conditions his employment may be continued or discontinued (*Cantelino v. McClellan*, 282 N. Y., 166). In the latter case the court said (at p. 170): "The People, in their new Constitution, could have abolished any or every public office in the State or changed the tenure of any office. Public officers are the servants of the People and the latter may say upon what terms they shall be engaged or continue in office after their engagement. Nothing limits the power of the People in this respect save a written constitution" (see also *United Public Works v. Mitchell*, 330 U. S., 75; *People ex rel. Miller v. Peck*, 73 App. Div., 89). In the present case the Legislature has found, as stated in the preamble of the Security Risk Law (sec. 1101) that the employment of members of subversive organizations

by government presents a grave peril to the national security; that these organizations are frequently well organized and rigidly disciplined and are dedicated to the overthrow of existing legally constituted government by any available means including force, if necessary. Significantly, the Court of Appeals in *Daniman v. Board of Education of City of N. Y.* (306 N. Y., 532) stated that the communist party was "a continuing conspiracy against our Government."

31 It does not seem unreasonable then for the Legislature to guard against such dangers by attaching conditions to employment in the public service and by adopting a procedure by which persons holding positions in security agencies could be dismissed where there is reason to believe that they might be members of subversive organizations. Indeed our courts have consistently upheld the right of the government to inquire into and to take measures to insure the loyalty of its employees (*Adler v. Board of Education of the City of N. Y.*, 342 U. S., 485, aff'g 301 N. Y., 476; *Garner v. Board of Public Works*, 341 U. S., 716; *Gerende v. Board of Supervisors*, 341 U. S., 56; *Bailey v. Richardson*, 182 F., 2d, 46, aff'd by an equally divided court 341 U. S., 918).

In my view the government has a duty to affirmatively exclude from public service its employees pledged to its overthrow by violence or subversion. Natural and moral law would surely dictate this modest measure for self-protection. No ordinary employer would be compelled to keep in his employ a person imbued with expressed determination to ruin him. The government should certainly not be in a lesser position. Nor should the public whom it represents be compelled to pay a salary to a public servant who plots to destroy its own way of life or be in a position to paralyze, disrupt or create panic at time of enemy action.

There is also an assertion by petitioner that the Security Risk Law is unconstitutional in that it denies procedural due process and operates upon unconstitutionally

32 vague standards. Under the statute a public employee is entitled to a written statement of the charges made against him, and in the present case petitioner did receive such a written statement. The statute also provides a reasonable time for the employee to an-

swer the charges, i. e., thirty days, and here the petitioner was given the required time to answer. Concededly, petitioner did not file an answer nor did he submit any statements or affidavits to explain his position. The determination made by respondents dismissing petitioner after his failure to answer the charges was an administrative act on their part and not judicial in character. Accordingly, in the absence of any statutory provision to the contrary, petitioner had no inherent right to a trial or a judicial hearing (*People ex rel. Keech v. Thomson*, 94 N. Y., 451; *People ex rel. Kennedy v. Brady*, 166 N. Y., 44).

The Security Risk Law also provides for an appeal to the State Civil Service Commission by any person who feels himself aggrieved by a determination of transfer or dismissal, but petitioner did not avail himself of this relief. It is to be observed that upon appeal the state civil service commission is given wide latitude to require amplification of the reasons given for the action appealed from, to hold or conduct public hearings or private hearings, and to subpoena and compel the attendance of witnesses and the production of books, papers, records and documents. Upon such hearing the employee is given the right by the statute to be represented by counsel and to present evidence in his behalf.

From the foregoing it is evident that the Security Risk Law is definite and clear and that under
33 its provisions a public employee is afforded all the safeguards of due process.

In *Bailey v. Richardson* (supra) the court upheld the right of the federal government to dismiss the employee without a trial on the ground of the superior's belief in the disloyalty of the employee to the government. There the superior's belief was predicated upon interrogatories creating the suspicion of membership in the Communist party and other allegedly subversive organizations. The court held that it was no valid objection that the employee was not told the names of the informants against her or that she was not permitted to face or examine them.

Petitioner's contention that the authority had no legal right to consider the evidence brought to its attention by the Commissioner of Investigation of the City of New York is also without force. The commissioner had the power

not only on behalf of the City of New York but also on behalf of the New York City Transit Authority to initiate an investigation as to petitioner's alleged affiliation with a subversive organization, title to the rapid transit facilities, i.e., the tunnels, elevated lines, yards, power plants and related properties is vested in the City of New York, and the transit authority operates these facilities under a lease executed by the city pursuant to Public Authorities Law, article 7, Title 15, section 1800, &c. The city, as the owner of these properties, has a proprietary interest in preserving them from sabotage or destruction and, consequently, in conducting an investigation to determine whether persons regularly employed in the operation of the transit system are members of subversive organizations or are of doubtful trust or reliability, the commissioner of investigation is making an investigation which, under the language of the New York City Charter, is "in the best interests of the City" (New York City Charter, sec. 803r[2]).

Furthermore, the transit authority is given the right by statute to avail itself of the services of the officers and agencies of the city government. Thus section 1803, subdivision 3-b, of the Public Authorities Law, provides in part as follows: "The authority shall be entitled to utilize the officers, employees, agents, facilities and services of the city on the same terms and conditions as were applicable to or provided to the board of transportation on March-fifteenth, nineteen hundred and fifty-three."

In view of the city's ownership of the transit system the commissioner of investigation properly initiated the investigation here involved and the authority had the right to make use of his services under the Security Risk Law, section 1105 of the Unconsolidated Laws. Moreover, the transit authority has the right under the statute to consider and weigh evidence from any source, whether it be from the commissioner of investigation or any other bureau or department of government. There is no limitation in the statute that the authority must make its determination upon evidence developed as a result of its own investigation. Significantly, the Court of Appeals in *Daniman v. Board of Education of City of New York* (supra) sustained the dismissal of several teachers in the

35 public schools and colleges of the City of New York upon the ground that they had refused to answer before a federal legislative committee whether they were at present or had been members of the Communist Party.

Petitioner also argues that reasonable grounds do not exist for the belief that his employment would endanger national or state security or defense. He contends that the assertion of his constitutional privilege cannot be regarded as "reasonable grounds" for belief that he was of doubtful trust and reliability. I am of the opinion that the determination of that question rests solely with the authority since the statute vests absolute discretion in the security agency to decide that issue. In any event, in reaching its determination the authority had to be guided by the declared public policy of the state, as set forth in its constitution, statutes and judicial records (*People v. Hawkins*, 157 N. Y., 1, 12; *Glaser v. Glaser*, 276 N. Y., 296, 301; *Matter of Carey v. Cruise*, 246 N. Y., 237, 243; *Mertz v. Mertz*, 271 N. Y., 466, 472). "Public policy is necessarily variable. It changes with changing conditions. It is evidenced by the expression of the will of the legislature contained in statutory enactments" (*Straus & Co. v. Canadian Pacific R. Co.*, 254 N. Y., 407, 413).

The public policy of this state, as stated in section 903 of the New York City Charter, is to make ineligible for public service any employee who fails or refuses to testify on grounds of possible self-incrimination. What is more important, such public policy is the fundamental law of the state, as expressed in article 1, section 6, of the New York State Constitution. In *Daniman v. Board* 36 of Education of City of New York (*supra*), the court, in sustaining the removal of the teachers for asserting their constitutional privilege, stated (at pp. 540-541): "In this court we are all agreed that the Communist party is a continuing conspiracy against our Government. (See, *Communications Assn. v. Douds*, 339 U. S., 382, 425 et seq.; *Dennis v. United States*, 341 U. S., 494, 564; Preamble to the Feinberg Law; L. 1949, ch. 360, sec. 1). We are also all in agreement that an inquiry into past or present membership in the Communist party is an inquiry regarding the official conduct of an officer or employee of the City of New York. Loyalty to our Government goes

to the very heart of official conduct in service rendered in all branches of Government. (See N. Y. Const., art. XIII, sec. 1; Education Law, sec. 3002; Civil Service Law, secs. 12a, 30; L. 1951, ch. 233, secs. 1, 8.) Communism is opposed to such loyalty (*Communications Ass'n v. Douds*, 339 U. S., 382, 425 et seq., supra; *Dennis v. United States*, 341 U. S., 494, 564, supra)."

Thus the defined public policy in the law of this state is to the effect that the pleading of a constitutional privilege or the refusal to waive the constitutional privilege is ground for the removal of an employee from the public service. It seems to me that a public servant whose trust and reliability is in question must make a choice. He must choose between the refuge of the Fifth Amendment and a disclosure as to possible communist affiliation. If he insists upon the refuge which is apparently denied to even a non-public servant under the National Subversive

37 Activities Control Act of 1950, as it has thus far been construed, he should not complain if he be turned out of a position of public trust. If he makes the disclosure of non-affiliation he loses nothing and regains the confidence which was formerly beset by suspicions. Thus, guilty or not, no man in public service is entitled to withhold information as to his communist association and at the same time serve the people. I therefore do not think it can be said that the action of the transit authority in dismissing petitioner was arbitrary or unreasonable.

Moreover, the courts of our state will not interfere with the exercise of discretion on the part of the officer having the power of removal where the procedure outlined in the statute for removal has been followed and the charges upon which the removal is based are not frivolous or without substance (*Matter of McGuire*, 157 App. Div., 351, aff'd 209 N. Y., 597). It is petitioner's added contention that respondents have failed to comply with the provisions of section 22, subdivision 2 of the Civil Service Law. This, too, appears to have little merit. Petitioner was removed under the provisions of the Security Risk Law, which is a special statute enacted subsequent to section 22 of the Civil Service Law for the particular purpose of detailing the procedure to be used in considering cases involving disqualification from public employment for al-

leged subversive conduct. The Security Risk Law is comprehensive in form and the procedure outlined therein indicates a clear intent on the part of the Legislature to establish an exclusive and uniform method of dealing with loyalty cases. Since the Security Risk Law is a special statute which legislates for a particular field, its provisions are to be given effect and must be deemed to have modified the general statute, i. e., section 22 of the Civil Service Law, which applies to the removal of public employees for misconduct (*Hughes Tool Co. v. Fielding*, 188 Misc., 947, aff'd 172 App. Div., 1048, aff'd 297 N. Y., 1024). It will be noted that the Security Risk Law does not provide for judicial review, and, on the contrary, sets forth the intention of the Legislature that no such right was to be accorded an employee who is transferred or dismissed because of doubtful trust or reliability.

However, except for the provisions in section 22 of the Civil Service Law which permit of a judicial review, the procedure to be followed for removal under both the Civil Service Law and the Security Risk Law is similar. A comparison of section 22 of the Civil Service Law and section 1105 of the Unconsolidated Laws will disclose that similarity. And, in the present case, the procedure outlined in both statutes was substantially complied with by respondents in considering petitioner's case.

There remains for consideration the question whether petitioner has a right to review the transit authority's determination in an article 78 proceeding. Section 1106 specifically provides that any person conceiving himself aggrieved by the action of the removing agency may appeal to the State Civil Service Commission within twenty days after receiving notice of the determination of transfer or dismissal, and the State Civil Service Commission is authorized and required to decide the appeal.

Section 1285, subdivision 4 of the Civil Practice Act provides that, except as otherwise provided by statute, the procedure under article 78 shall not be available to review a determination where it can be adequately reviewed by an appeal to a court or some other body or officer. Were it not for the fact that the constitutionality of the Security Risk Law is here for the first time put at issue, the respondents' determination could have

been completely and adequately reviewed by an appeal to the State Civil Service Commission. Indeed, section 1106 expressly provides that "the decision of the Commission shall be final and conclusive and not subject to review by any court." So, to be consistent, the fact of validity of the statute would ordinarily require the petitioner to complete his statutory remedy by appealing to that body (People ex rel. Walrath v. O'Brien, 112 App. Div., 97). But the grounds for review do include the heretofore undetermined question of constitutionality of the statute whose sanctions are applied against the petitioner. In the absence of decisional law as to its constitutionality, he is justified in addressing himself to the court despite its provisions for final and conclusive determination by the State Civil Service Commission.

The Security Risk Law is in all respects valid and constitutional and the respondents' determination based thereon is affirmed as neither arbitrary nor unreasonable. The motion to dismiss the petition is granted.

40 IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Index No. 15187—1954

(Title Omitted)

Notice of Appeal to Appellate Division—Feb. 8, 1955

Sirs:

PLEASE TAKE NOTICE, that the petitioner above named, hereby appeals to the Appellate Division of the Supreme Court in and for the Second Judicial Department, from an order made in the above entitled proceeding by the Honorable Benjamin Brenner, Justice of the Supreme Court, on January 28th, 1955, and entered in the office of the Clerk of the County of Kings on January 29th,

41 1955, denying the petitioner's application pursuant to Article 78 of the Civil Practice Act, and for further relief, and granting the respondents' motion to dis-

miss the petition, and dismissing the petition and the above entitled proceeding, and from each and every part of said order.

Dated: New York, N. Y., February 8th, 1955.

Yours, etc.,

LEONARD B. BOUDIN,
Attorney for Petitioner,
Office and P. O. Address,
25 Broad Street,
Borough of Manhattan,
City of New York (5).

To:

CLERK OF THE COUNTY OF KINGS.

HAROLD L. WARNER, Esq.,
Attorney for Respondents,
370 Jay Street,
Borough of Brooklyn,
City of New York.

42 IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

(Title omitted)

Notice of Appeal to Court of Appeals—Aug. 16. 1956

Sirs:

PLEASE TAKE NOTICE that the petitioner, Max Lerner, hereby appeals to the Court of Appeals of the State of New York, from an order in the above-entitled proceedings, entered in the office of the Clerk of the Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, on the 25th day of June 1956, filed in the Office of the Clerk of the County of Kings on the 27th day of June 1956, and served upon
43 the undersigned as attorney for the petitioner, Max Lerner, on the 9th day of August 1956. The said order, from which petitioner appeals, affirmed an order

of the Supreme Court, Kings County, entered in the above proceedings, denying petitioner's application for an order, pursuant to Article 78 of the Civil Practice Act, and dismissing the petition of the said petitioner. One Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, dissented and voted to reverse the order of the Supreme Court, Kings County.

PLEASE TAKE FURTHER NOTICE that the petitioner, Max Lerner, appeals from each and every part of the aforesaid order of the Appellate Division of the Supreme Court, Second Department, and from the whole thereof.

Dated: New York, N. Y., August 16, 1956.

Yours, etc.

LEONARD B. BOUDIN
Attorney for Petitioner
Office and P. O. Address
25 Broad Street
New York 4, N. Y.

To:

CLERK OF THE COUNTY OF KINGS
Hall of Records
Brooklyn 1, N. Y.

44 DANIEL T. SCANNELL, Esq.
Attorney for Respondents
New York City Transit Authority
370 Jay Street
Brooklyn 1, N. Y.

JACOB K. JAVITS, Esq.
Attorney General of the State
of New York
Capitol,
Albany 1, N. Y.

45 AT THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

Present:

HON. GERALD NOLAN,
Presiding Justice.

" GEORGE J. BELDOCK,

" CHARLES E. MURPHY,

" HENRY L. UGHETTA,

" PHILIP M. KLEINFELD,
Justices.

(Title omitted)

Order of Affirmance—June 25, 1956

The above named Max Lerner, the petitioner in this proceeding, having appealed to the Appellate Division
46 of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Kings on the 29th day of January, 1955, denying petitioner's application, pursuant to Article 78 of the Civil Practice Act, to be reinstated and restored to his position as Conductor by the New York City Transit Authority, etc., and granting respondents' motion to dismiss the petition, and dismissing the petition herein, and the said appeal having been argued by Mr. Leonard B. Boundin of Counsel for the appellant, argued by Mr. Daniel T. Scannell of Counsel for the respondents and submitted by Mr. James O. Moore, Jr., Solicitor General, and Ruth Kessler Toch, Assistant Attorney General, pursuant to Section 71 of the Executive Law deliberation having been had thereon, and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered that the order so appealed from be and the same hereby is affirmed, with \$50. costs and disbursements.

Nolan, P. J., Murphy, Ughetta and Kleinfeld, JJ., concur; Beldock, J., dissents and votes to reverse the order and to reinstate appellant in opinion.

Enter:

JOHN J. CALLAHAN,
Clerk.

47 **IN SUPREME COURT OF THE STATE
OF NEW YORK**

**APPELLATE DIVISION—SECOND JUDICIAL
DEPARTMENT**

**NOLAN, P. J., BELDOCK, MURPHY, UGHETTA
and KLEINFELD, JJ.**

Opinion of Appellate Division

Appeal from an order of the Supreme Court at Special Term (Brenner, J.), entered January 29, 1955 in Kings County, granting respondents' cross motion to dismiss the petition.

LEONARD B. BORDIN, for appellant.

DANIEL T. SCANNELL and EDWARD L. COX, JR., for respondents.

48 JACOB K. JAVITS, Attorney-General (JAMES O. MOORE, Jr., and RUTH KESSLER TOCH of counsel), pursuant to section 71 of the Executive Law.

UGHETTA, J.:

With the outbreak of hostilities in Korea in 1950, the world's attention was rudely focused on the increasing audacity of the communist conspiracy, by force or by guile, to accomplish its long-announced aim of taking over the free world. The Legislature, early in its next session, accordingly enacted chapter 233 of the Laws of 1951, effective March 24, 1951, hereinafter referred to as the "Security Risk Law."

Section 1 is a declaration of legislative findings and intent.* It refers to the Korean situation, and then finds that the employment by government of members of well-organized and rigidly disciplined subversive groups presents a grave peril to the national security. It is then found that "If members of such organizations and groups and persons concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in public service in security positions would endanger the security or defense of the nation and the state, are permitted to hold public office and employment, their retention in security positions during the exist-

ence of a national emergency would imperil or endanger the safety, welfare or best interests of the armed forces, the civilian defense forces and the people of this state and of the United States." Having found the existence
 49 of this danger as a fact, the section then points to the remedy—"it is vital and essential that measures be taken to effect the disqualification for entrance into and the suspension and removal from security offices and positions in governmental service of persons concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in security positions would endanger the security or defense of the nation and the state."

Section 5 provides for the transfer to non-security positions or agencies of employees deemed to be security risks. This section specifically refers to a "security position" or "position in a security agency". A finding that the position itself is a sensitive one is not required. It is sufficient that it be in an agency that the State Civil Service Commission has determined to be one wherein functions are performed which are necessary to the security or defense of the nation and the State or where confidential information relating to such security or defense may be available, and such determination by the commission is subject to review by the courts (§§ 2, 3). Section 5 further provides for the suspension of employees when it is found "after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state." The suspended employee is to be given notice of such action and of the reasons therefor and is to be afforded an opportunity, within thirty days
 after such notice, to submit statements or affidavits.

50 Thereafter, following such further investigation and review as is deemed necessary, his transfer shall be affirmed or his employment terminated, if it shall be found that upon all the evidence, reasonable grounds exist for the belief that, because of doubtful trust and reliability his employment would endanger the security or defense of the nation and the State. Otherwise he is to be restored to his position and is entitled to back pay for the

period of his suspension. Section 6 provides for an appeal from the determination to the State Civil Service Commission and for a hearing by that body or by persons designated by it, and further provides that the decisions of the commission shall not be reviewable by the courts.

Section 7 provides that evidence shall not be restricted by the rules prevailing in the courts, that a finding may be based on previous conduct including, but not limited to, treasonable or seditious conduct or membership in any organization or group found by the State Civil Service Commission to be subversive. Section 8 defines a subversive group or organization to be one which is found by the State Civil Service Commission, after inquiry, to advocate, advise, teach or embrace the doctrine of overthrow of the government by force and violence. The commission, in making such inquiry, may utilize any listings or designations promulgated by, among others, any Federal agency, and may adopt designations of the United States Attorney General, provided such designation was made after due notice to such organization or group and an opportunity afforded it to answer.

51 Appellant has been removed pursuant to this statute from his position as a conductor on the New York city subway system on a finding that reasonable grounds exist for belief that because of his doubtful trust and reliability, his employment endangers the security or defense of the nation and State. He brings this proceeding pursuant to article 78 of the Civil Practice Act to secure his reinstatement.

The petition having been dismissed on the ground that it does not state facts sufficient to entitle appellant to the relief prayed for, we must take the allegations therein contained to be true. These allegations may be summarized as follows: Appellant is a citizen of the United States and a resident of the Borough of the Bronx. Respondents are members of the New York City Transit Authority, a public benefit corporation organized pursuant to section 1800 et seq. of the Public Authorities Law. It is an agency created by the State performing a governmental function (Public Authorities Law, § 1802) and as such governmental agency is subject to the provisions of the Security Risk Law. Under the provisions of section 1810 of the Public

Authorities Law appellant became an employee of the Transit authority subject to the provisions of the State Civil Service Law. His primary duties consisted of opening and closing subway doors to permit the entrance and exit of passengers together with certain routine duties incidental thereto. His service has at all times been deemed satisfactory and on one occasion he was awarded a commendation. On September 14, 1954 pursuant to instruction from his immediate supervisor, he appeared at the office of the commissioner of investigation of the city of New York where he was advised by a deputy commissioner that unless he answer all questions fully he would be subject to dismissal. After being sworn, he declined to answer questions concerning his political affiliations, relying upon his constitutional privilege. On two subsequent dates he appeared with counsel and was advised that the mayor of the city of New York had authorized the commissioner of investigation to inquire into the employment of certain persons in, among other agencies, the Transit Authority. He was again sworn and reiterated his refusal to answer for the reasons stated. On October 21, 1954 he was suspended. The resolution passed by the Transit Authority recited that it had been found, after due investigation and inquiry, that reasonable grounds exist for belief that, because of his doubtful trust and reliability, the employment of Max Lerner in the position of Conductor would endanger the security or defense of the nation and the state. It further provided that appellant might within thirty days submit statements or affidavits to show why he should be reinstated or restored to duty. He was informed that the action was taken because he refused to answer questions under oath as to whether he was then a member of the Communist party. His right to submit statements or affidavits within thirty days was pointed out to him. The petition alleges that no charge other than his refusal to answer was made and that for this reason no statements or affidavits were submitted. On November 24, 1954 appellant was discharged by resolution containing a recital similar to the one in the suspension resolution, together with a recital that he had not within the thirty-day period communicated with the Transit Authority.

The first question presented is whether the Security Risk Law is to be construed as authorizing the Transit Authority to suspend and discharge appellant merely upon a showing that invoked his constitutional privilege when asked if he was then a member of the Communist party. Section 5 of said law, unlike some other statutes, makes no specific reference to a refusal to answer.

It cannot be gainsaid that the communist conspiracy is a cancer threatening our nation's existence. As was pointed out in *Matter of Danimay v. Board of Educ. of City of N. Y.* (306 N. Y. 532, 540-541, overruled on other grounds in *Slochow v. Board of Higher Educ.*, 350 U. S. 551, rehearing denied U.S., May 28, 1956):

"In this court we are all agreed that the Communist party is a continuing conspiracy against our Government. (See, *Communications Assn. v. Douds*, 339 U. S. 382, 425 et seq.; *Dennis v. United States*, 341 U. S. 494, 564; Preamble to the Feinberg Law (L. 1949, ch. 360, Sec. 1.) We are also all in agreement that an inquiry into past or present membership in the Communist party is an inquiry regarding the official conduct of an officer or employee of the City of New York. Loyalty to our Government goes to the very heart of official conduct in service rendered in all branches of Government. (See N. Y. Const., art. XIII, § 1;

Education Law, § 3002; Civil Service Law, §§ 12a, 54, 30; L. 1951, ch. 233, §§ 1, 8.) Communism is opposed to such loyalty. (*Communications Assn. v. Douds*, 339 U. S. 382, 425 et seq., *supra*; *Dennis v. United States*, 341 U. S. 494, 564, *supra*.) Internal security affects local as well as National Governments."

It is quite true we may not infer that appellant is a member of the Communist party from his assertion of privilege against self incrimination. On the other hand we are required to, and should, accept as truthful his statement that answers to the questions propounded might have tended to incriminate him. (*Ullmann v. United States*, 350 U. S. 422; see *Blau v. United States*, 340 U. S. 159.)

In *Garner v. Los Angeles Bd.* (341 U. S. 716), the court had before it a provision of the Los Angeles City Charter which provided that no person shall hold or retain public office or employment who advocated the overthrow of the

government or was a member of any organization advocating such overthrow. The city by ordinance required the execution of an affidavit by its officers and employees to the effect that they did not advocate the overthrow of the government or belong to any subversive organization. Some employees declined to execute such an affidavit and were discharged for this reason. The court upheld such action, stating (p. 720):

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may
55 have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

The above language was quoted with approval in *Adler v. Board of Educ.* (342 U.S. 485, 492-493), where the court upheld the constitutionality of the Feinberg Law (Education Law, § 3022).

Justice Frankfurter said in his concurring opinion in the *Garner* case (pp. 725-726):

"A municipality like Los Angeles ought to be allowed adequate scope in seeking to elicit information about its employees and from them. It would give to the Due Process Clause an unwarranted power of intrusion into local affairs to hold that a city may not require its employees to disclose whether they have been members of the Communist Party or the Communist Political Association. In the context of our time, such membership is sufficiently relevant to effective and dependable government, and to the confidence of the electorate in its government. I think the precise Madison would have been surprised even to hear it suggested that the requirement of this affidavit was an 'Attainder' under Art. I, § 10, of the Constitution. . . . I cannot so regard it."

We apprehend that if a statute, such as the Los Angeles ordinance permitting discharge of a public employee for refusal to execute an affidavit of the character there required, is valid and justifies his discharge for that reason,

56 it is proper for a security agency, charged with the duty of determining whether an employee is of doubtful trust and reliability from a security standpoint to inquire into those matters and, if the employee refuses to answer, it may not be said that the agency is not empowered to find that such refusal, in and of itself, furnishes reasonable grounds for a belief that he is not a good security risk. It is our view that the correct construction has been placed on the Security Risk Law by the Transit Authority and by the Special Term.

We pass to the problem of constitutionality. Appellant takes exception to the statement of the Special Term that this "statute is presumed to be constitutional and the courts may not declare it unconstitutional unless it is clearly so." It is argued that there is a distinction between cases under the fourteenth Amendment involving property rights and those cases under that amendment which are tinged with personal rights protected in the First Amendment against an encroachment by the Federal government. The First Amendment reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

In *Board of Educ. v. Barnette* (319 U. S. 624, 639), the court said:

57 "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedom of speech and

of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

See, to the same effect, *Thomas v. Collins* (323 U. S. 516, 529-530).

Dennis v. United States (341 U.S. 494), involving the constitutionality of the Smith Act (U. S. Code, tit. 18, § 11), was clearly a freedom of speech case involving an enactment of Congress. Its validity was upheld. *Gitlow v. New York* (268 U. S. 652) involved a New York statute, similar to the Smith Act, making it a crime to advocate "the necessity or propriety of overthrowing * * *

58 organized government by force". It was held that the test was whether the statute was reasonable, and that it was entirely reasonable for the State to attempt to protect itself from violent overthrow, and the statute was perforce reasonable. *Communications Assn. v. Douds* (339 U.S. 382) was decided on the theory that a restriction on freedom of speech in the Federal statute (U. S. Code, tit. 29, § 159, subd. [h]) must pass the "clear and present danger" test. At page 412 it is stated that the First Amendment "requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial evil will result therefrom." *Schneider v. State* (308 U. S. 147) likewise involved a direct restriction on freedom of speech—an ordinance prohibiting distribution of literature and house to house canvassing unless licensed by the police.

On the whole we think the correct interpretation of these cases is that where the rights protected by the First Amendment are involved, closer scrutiny should be accorded to the evil which the Legislature seeks to remedy and a higher degree of care should be invoked before the courts sustain the validity of legislation impinging on these rights, than in a case where property rights, protected alone by the Fourteenth Amendment, are involved. But this is not to say that there is no presumption of constitutionality in a case of the statute duly enacted by a sovereign State.

In *Munn v. Illinois* (94 U. S. 113, 123) it was stated: "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the express will of the legislature should be sustained" (see, also, *Matter of Fay*, 291 N. Y. 198, 206-207). In short, the stringency of the test to be applied in determining whether the presumption is overcome is in reality the difference between cases involving property rights and those where civil rights are concerned.

Our first inquiry must be whether the subject of the legislation before us is one on which the Legislature is permitted to act. We think the *Garner* and *Adler* cases hereinabove cited, sustaining the validity of the Los Angeles ordinance and of the Feinberg Law, leave no doubt on that score.

We proceed now to examine the question of whether the Security Risk Law bears a real and substantial relation to the permitted objective without unreasonably interfering with personal rights. Appellant's principal reliance is on *Anti-Fascist Committee v. McGrath* (341 U. S. 123) and *Wieman v. Updegraff* (344 U. S. 183). In the *Wieman* case on Oklahoma statute, requiring State officers and employees to take a loyalty oath stating, among other things, that they had not been for the preceding five years a member of any organization listed by the United States Attorney General as "a Communist front" or "subversive", had been construed by the State court as excluding persons from employment solely on the basis of membership in such organization irrespective of their knowledge of the activities and aims of the groups to which they had belonged. The court

held that as so construed the statute was violative of the due process clause of the Fourteenth Amendment, which does not permit a State to classify innocent with knowing association. The court stated (p. 191): "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." The court at pages 188-189 distinguished the *Garner* and *Adler* cases hereinabove referred to, on the ground that in the former *scienter* was implicit in each clause of the oath, and in the latter, as the court pointed out; "we expressly noted that the New York Courts had construed the

statute to require knowledge of organizational purpose before the regulation could apply."

The *Anti-Fascist Committee* case involved a situation where the United States Attorney General had listed certain organizations as communist *without notice or hearing*. There organizations sued for declaratory judgments and for injunctive relief. The lower courts granted motions to dismiss the complaints for failure to state claims upon which relief could be granted. The judgments were reversed and the cases remanded for instructions to deny the motions. Section 8 of the Security Risk Law specifically provides that the designation of an organization as subversive must have been made after notice, and appropriate hearing.

Recent authoritative word on the subject is *Slochower v. Board of Higher Education* (350 U. S. 551, *supra*). The New York Court of Appeals had held section 903 of the New York City Charter to be constitutional and applicable to refusal to answer questions concerning communist affiliations. (*Matter of Daniman v. Board of Educ.* 61 *of City of N. Y.*, 306 N. Y. 532, *supra*) In the *Slochower* case the court held that statute to be invalid, at least in part, as violative of the due process clause of the Fourteenth Amendment. All the court actually decided was that a city college teacher, who was entitled to tenure and who could be discharged only for cause after notice, hearing and appeal under the provisions of subdivisions 2 and 10 of section 6206 of the Education Law, could be mandatorily and summarily dismissed for invoking the Fifth Amendment before a congressional committee conducting an inquiry *not* directed at the property, affairs of government of the city or the official conduct of city employees. The statutory provisions, as well as the facts, are clearly distinguishable. Section 903 of the charter apparently renders obligatory the discharge, without notice or hearing of any kind, of an employee who "shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry or having appeared shall refuse to testify or answer any question regarding the property, government or affairs of the city or of any county included

within its territorial limits" and for like summary removal for refusal to waive immunity upon any such hearing or inquiry. The opinion of the court concludes with this language:

"... we consider the application of § 903. As interpreted and applied by the state courts it operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are
62 taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of *Wieman v. Updegraff*, *supra*.

"It is one thing for the city authorities themselves to inquire into Slochower's fitness but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or . . . official conduct of city employees.' In this respect the present case differs materially from *Garner*, where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information.

"This is not to say that Slochower had a constitutional
63 right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest in

the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law." We apprehend that in view of the manner in which the court stressed the "remoteness of the period to which they [the questions] are directed," the failure of the statute to provide an opportunity to explain the reason for refusal to answer and, more particularly, the nature of the inquiry being conducted by the Federal committee, that decision must be strictly limited to its own peculiar facts. The reference to the *Garner* case is some indication that, had Professor Slochower's refusal to answer occurred before a duly constituted body investigating the affairs of the Board of Higher Education or of Brooklyn College, a different result would have been reached even under section 903 of the charter.

In the instant case, appellant's testimony was sought in a duly authorized inquiry by the commissioner of investigation into the affairs of the Transit Authority. He declined on three separate occasions to answer questions concerning his *present* membership in the Communist party. He was thereupon suspended, given notice and afforded, in accordance with the statute, an opportunity to explain his conduct. He proffered no explanation, nor did he avail himself of his right to an appeal and to full hearing before the State Civil Service Commission.

64 It is true that in the *Slochower* case the court stated: "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." (350 U.S. 551, 557, *supra*.) But the court cited *Ullmann v. United States* (350 U.S. 422, *supra*), which upheld the validity of the Immunity Act of 1954 (U. S. Code, tit. 18, §34-6). The determination in the *Slochower* case fortifies the conclusion that we are required to, and should, accept as truthful appellant's claim that truthful answers to the questions propounded might have tended to incriminate him. The court, in the *Ullmann* case, cited and reaffirmed *Brown v. Walker* (161 U. S. 591), stating (p. 439): "Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases."

We see little similarity between the *Wieman, Anti-Facist Committee*, and *Slochower* cases and the one before us. We

are not here concerned with an arbitrary exclusion of an employee irrespective of his guilty knowledge or intent, remoteness of time or mistake or inadvertence, but with a finding, after an opportunity to submit a statement or affidavits and an opportunity to appeal to the State Civil Service Commission, that reasonable grounds exist for belief that because of doubtful trust or reliability he constitutes a security risk. Nor do we regard the determination in *Cole v. Young* (.... U. S., decided June 11, 1956) as indicating a different conclusion. The Statute there construed is the so-called Federal Security Risk Law of 1950 (U. S. Code, tit. 5, § 22-1). The court pointed out (p.):

65 "The Act was expressly made applicable only to the Departments of State, Commerce, Justice, Defense, Army, Navy, and Air Force, the Coast Guard, the Atomic Energy Commission, the National Security Resources Board, and the National Advisory Committee for Aeronautics. Section 3 of the Act provides, however, that the Act may be extended 'to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interest of national security.' And the President has extended the Act under this authority 'to all other departments and agencies of Government.'" The court held (....): "(1) that the term 'national security' is used in the Act in a definite and limited sense and relates only to those activities which are directly concerned with the Nation's safety, as distinguished from the general welfare; and (2) that no determination has been made that petitioner's position was affected with the 'national security' as that term is 'used in the Act', and that the dismissal there was accordingly not authorized by the Act. It was further stated (p.): 'In reaching this conclusion, we are not confronted with the problem of reviewing the Secretary's exercise of discretion, since the basis for our decision is simply that the standard prescribed by the Executive Order and applied by the Secretary is not in conformity with the Act.' In reaching this conclusion as to the congressional intent, the court reasoned as follows (pp.):

"Virtually conclusive of this narrow meaning of 'national security' is the fact that had Congress intended the

term in a sense broad enough to include all activities of the Government, it would have granted the power to terminate employment 'in the interest of the national security' to all agencies of the Government. Instead, Congress specified 11 named agencies to which the Act should apply, the character of which reveals, without doubt, a purpose to single out those agencies which are directly concerned with the national defense and which have custody over information the compromise of which might endanger the country's security, the so-called 'sensitive' agencies. Thus, of the 11 named agencies 8 are concerned with military operations or weapons development, and the other 3, with international relations, internal security, and stock-piling of strategic materials. Nor is this conclusion vitiated by the grant of authority to the President, in § 3 of the Act, to extend the Act to such other agencies as he 'may, from time to time, deem necessary in the best interests of national security.' Rather, the character of the named agencies indicates the character of the determination required to be made to effect such an extension. Aware of the difficulties of attempting an exclusive enumeration and of the undesirability of a rigid classification in the face of changing circumstances, Congress simply enumerated those agencies which it determined to be affected with the 'national security' and authorized the President, by making a similar determination, to add any other agencies which were, or became, 'sensitive.' That it was contemplated that this power would be exercised 'from time to time' confirms the purpose to allow for changing circumstances and to require a selective judgment necessarily implying that the standard to be applied is a less than all-inclusive one.

All this is clearly distinguishable from the situation in the case at bar, where, as has been pointed out, the statute specifically requires the State Civil Service Commission to make a determination, reviewable by the courts, that the agency or position is in fact one which affects the security of the State or nation.

Irrespective of the propriety of regarding the mere invoking of the privilege against self incrimination (which might be considered by some a technicality, although others would regard it of considerable substance) as constituting

a justification for a finding of doubtful trust and reliability, we feel that the Transit Authority's conclusion was indeed warranted when appellant declined to state, on whatever grounds, whether he was a member of a conspiracy dedicated to the forcible overthrow of our government, refused to explain such declination, and failed to take advantage of an opportunity to be heard on the subject.

While the State may not arbitrarily and capriciously bar a person from public employment, nonetheless a person does not have an unqualified right to work for the State on his own terms; the State may impose reasonable terms. As the court said in *Adler v. Board of Educ.* (342 U. S. 485, 492, *supra*): "If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."

With respect to the contention that procedural due process was denied appellant because he was not accorded the rights provided in section 22 of the Civil Service Law governing the procedure to be followed in the removal of civil service employees for misconduct or incompetency; it is necessary only to point out that the last sentence of subdivision 3 of said section provides:

"Nothing herein contained shall be construed to repeal or modify any general, special, local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any city or any civil division."

(See *Matter of Ryan v. Hand*, 258 App. Div. 912; *Matter of Skinkle*, 249 N. Y. 172; *Matter of Gran v. Speers*, 206 Misc. 1020.) Section 22 must be held to be inapplicable here. Had appellant availed himself of his right to appeal to the Civil Service Commission, it may well be that rather than being discharged he would have been transferred to a non-security position or agency.

The order should be affirmed, with \$50 costs and disbursements.

NOLAN, P.J., MURPHY and KLEINFELD, J.J., concur.

BELDCOCK, J. (dissenting).

On October 21, 1954 appellant was suspended, and on November 24, 1954 discharged, by the New York City Transit Authority from his position as a subway conductor. His duties consisted primarily of opening and closing subway doors to permit the entrance and exit of passengers. The ground for the action of the Transit Authority was that appellant held a position in a security agency, and that reasonable grounds existed for belief that, by reason of doubtful trust and reliability, his continued employment would endanger the security or defense of the United States and of New York State. The latter finding was based *solely* on evidence that appellant had invoked the constitutional privilege against self incrimination when questioned by the New York city department of investigation concerning his past or present membership in the Communist party. The action was taken pursuant to the purported authority of the Security Risk Law.

In my opinion, appellant's suspension and discharge were illegal for three reasons: (1) the Security Risk Law is inapplicable to employees of the New York City Transit Authority because its employees are not in the service of the State or of any civil division thereof; (2) even if the Security Risk Law is applicable to employees of the Transit Authority, it is inapplicable to appellant because he did not hold a security position therein or a sensitive position affected with the security or defense of the nation or the State, and (3) neither suspension nor discharge is authorized under the Security Risk Law where the assertion of the constitutional privilege against self incrimination is the only evidence of doubtful trust and reliability endangering the security or defense of the nation and the State.

The New York City Transit Authority was created by the Legislature as a "body corporate and politic constituting a public benefit corporation." (Public Authorities Law, § 1801, subd. 1.) It was established as a separate entity because of the administrative and fiscal advantages attained by the separation of its functions from the general administrative machinery of the State and its civil divisions (1929 Atty. Gen. 223) and to insulate the State from liability in the performance of a specific pub-

lie service. Despite the fact that the Transit Authority is a corporate agent and instrumentality of the State in the discharge of a governmental function (1949 Atty. Gen. 138: Public Authorities Law, § 1802, subd. 2), its employees are *not* employees of the State or of any of its civil divisions. (1951 Atty. Gen. 152.) The Security Risk Law applies by its terms only to persons in "governmental service" (§§ 1, 4), i.e., in the service of the State or of any of its civil divisions (§§ 3, 5). Since appellant, as an employee of the Transit Authority, was not in the service of the State or of any civil division thereof, he was not encompassed by the Security Risk Law. Therefore, his suspension and subsequent discharge pursuant to that law were illegal.

However, even assuming that the Security Risk Law was applicable to employees of the Transit Authority, it was *not* applicable to appellant because there is no finding that he held either a security position or a sensitive position affected with the security or defense of the nation or State. The basic language of the State law under consideration was adopted from language used with respect to Federal agencies. (See Governor's memorandum approving the law, McKinney's 1951 Session Laws of N. Y., p. 1587.) The Supreme Court has recently held (*Cole v. Young*, . . . U. S. . . ., decided June 11, 1956) that the Federal Security Risk Law (U. S. Code, tit. 5, § 22-1) does not apply to all positions in security agencies, but only to security positions therein. The court limited the use of the term "national security," as used in that law, to comprehend only those activities of the government directly concerned with the protection of the nation from internal subversion or foreign aggression, and found that activities which contribute to the strength of the nation only through their impact on the general welfare were not included therein. The court specifically held that the summary procedure for suspension and discharge authorized therein is available only with respect to an employee in a sensitive position or to one situated where he can bring about a discernible effect on the nation's security, i.e., to employees whose position is affected with, and whose misconduct would adversely affect, the national security. The State law presently under consideration, patterned on the similar Federal law, should be given the

same interpretation. In the case at bar, although there is a finding that appellant's employment in the position of conductor endangers the security or defense of the nation and State, similar to the general finding in *Cole v. Young*, (*supra*), there is absent the finding which the Supreme Court held a necessary requisite to suspension or discharge under the Federal law, to wit, that appellant's position as conductor was one in the category to which the Security Risk Law is limited. The opinion indicated that the latter finding might be based on evidence that the position was sensitive because the employee had access to governmental secrets or classified material, or that he was in a position to influence policy against the interests of the government. Without that necessary finding here, the suspension and discharge were invalid.

72 Finally, there was no proof that appellant was a security risk within the provisions of the statute. The essence of the majority opinion is that, accepting as truthful appellant's statement that answers to questions as to his past or present membership in the Communist party might have tended to incriminate him, such refusal to answer, standing alone, gives reasonable ground to believe that appellant is of doubtful trust and reliability and thereby his continued employment as a subway conductor endangers the security or defense of the United States and New York State. It is precisely that inference of guilt from the truthful assertion of the same privilege in answer to the same questions which was repudiated by the Supreme Court in *Stochower v. Board of Higher Educ.* (350 U. S. 551, 557) when it said: "We must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. . . . The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."

The Security Risk Law does not provide that a refusal to answer questions concerning membership in the Communist party, or the assertion of a constitutional privilege, when asked such questions, is sufficient ground for suspension or discharge. On the contrary, section 7 thereof seems to require affirmative evidence of wrongful conduct

on the part of the employee to support a finding under either section 4 or section 5. Section 7 provides that a finding under section 4 or section 5 may be based on membership in a subversive organization. Unless the statute is construed to mean guilty rather than innocent membership, it would be invalid. (*Wicman v. Updegraff*, 344 U. S. 183; *Garner v. Los Angeles Bd.*, 341 U. S. 716.) Yet, although the constitutional privilege serves to protect persons innocent of any wrongdoing whatever (*Schlochower v. Board of Higher Educ.*, 350 U. S. 551, *supra*), and although no inference of membership in the Communist party may be drawn from the assertion of the privilege (*Matter of Daniman v. Board of Educ. of City of N. Y.*, 306 N. Y. 532, 538), the majority holds that appellant was properly suspended and discharged, whether or not he was a member of the Communist party, and whether he was an innocent or guilty member thereof. The mere exercise of the constitutional privilege has now become the basis for suspension and discharge under the statute, quite apart from an inference of guilt. In my opinion, such a determination not only departs from established authority, but permits the court to set as a criterion that which the Legislature has not done, namely, to make the assertion of the privilege a test of endangering the security or defense of the nation and the State. In the *Schlochower* case it was held that a State violates due process when it makes a claim of privilege ground for discharge. Yet here, where the statute does not provide what the statute there expressly provided, the Transit Authority has nevertheless made the claim of privilege ground for suspension and discharge, and the majority has approved that action. I am unable to concur in such a determination.

The order should be reversed and the appellant should be reinstated.

74 IN THE COURT OF APPEALS OF NEW YORK

**Order Granting Leave to New York Civil Liberties Union to
File Amicus Curiae Brief—November 28, 1956**

A motion having heretofore been made herein by the New York Civil Liberties Union for leave to file a brief amicus curiae and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted.

75 IN THE COURT OF APPEALS OF NEW YORK

In the matter of MAX LERNER, Appellant, against HUGH J. CASEY et al., Constituting the New York City Transit Authority, Respondents.

Opinion—Decided February 28, 1957

CONWAY, Ch. J. We are here concerned with the question of whether petitioner is entitled to an order reinstating him to the position of subway conductor in the New York City Transit System. He has been discharged from such position by the respondents, constituting the New York City Transit Authority, upon the ground that a reasonable basis exists for the belief that, because of his doubtful trust and reliability, his employment in the position of conductor endangers the security or defense of the nation and the State.

On September 14, 1954, pursuant to instructions received from his immediate superior, petitioner appeared at the office of the commissioner of investigation of the City of New York for the purpose of answering questions in an investigation being conducted by the commissioner. After he was sworn, petitioner was asked whether he was then a member of the Communist party. He refused to answer upon the ground that to do so might tend to incriminate him and that, therefore, he was entitled to claim the privilege against self incrimination afforded him under the Fifth Amendment to the United States Constitution.

After being advised of the provisions of the Security Risk Law (L. 1951, ch. 233, as amd.) and being given an opportunity to reconsider his refusal, he reappeared at the office of the Department of Investigation on September 21, 1954, at which time he requested additional time to engage counsel. On September 30, 1954 he
 76 appeared, accompanied by counsel who requested and was granted a further adjournment. On October 8, 1954 petitioner again appeared with counsel and once more refused to answer question as to whether he was then or had been a member of the Communist party.

The foregoing facts were brought to the attention of the Transit Authority. Thereafter, on October 21, 1954, the Authority adopted a resolution suspending petitioner, without pay, effective at the close of business on October 22, 1954. The resolution was sent to the petitioner with a covering letter. Both the letter and the resolution recited the reasons for the action taken and both notified the petitioner that he had the opportunity, within 30 days after notification, to submit statements or affidavits to demonstrate why he should be reinstated or restored to duty.

By report dated November 22, 1954, the executive director and general manager notified the Authority that, during the 30-day period allowed him, neither petitioner, nor anyone on his behalf, had communicated with the Authority or the Department of Investigation of the City of New York, and that further investigation had revealed activities on the part of the petitioner which gave reasonable grounds for belief that he was not a good security risk. The Authority then found, upon review, that, upon all the evidence, reasonable grounds existed for the belief that because of his doubtful trust and reliability, the employment of petitioner in the position of conductor endangered the security or defense of the nation and the State. Accordingly, the employment of petitioner was terminated at the close of business on November 24, 1954.

The Security Risk Law, under which petitioner was discharged, was adopted in 1951 and has been extended so that its terminal date is now June 30, 1957 (L. 1956, ch. 310), unless extended again.

It will be helpful if we here summarize the various sections of the Security Risk Law.

The first section—section 1—is the declaration of the Legislature's findings and intent. It states, in part, that the Legislature " * * finds that the employment of members of subversive groups and organizations by government presents a grave peril to the national security. These groups and organizations are frequently well organized and rigidly disciplined, and often under the direction and control of a foreign power are dedicated to the task of bringing about the overthrow of existing legally constituted government by any available means, including force if necessary. If members of such organizations * * * concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in public service in security positions would endanger the security or defense of the nation and the state, are permitted to hold public office and employment, their retention in security positions during the existence of a national emergency would imperil or endanger the safety, welfare or best interests of the armed forces, the civilian defense forces and the people of this state and of the United States. * * *"

Section 5 provides for the suspension and removal or transfer of an employee under the statute. The provision conferring this authority is as follows: "Any public officer, board, body of commission of the state or of any civil division thereof authorized by law, rule or regulation to exercise the power of appointment may, in his or its absolute discretion and when deemed necessary in the interests of national security, transfer, subject to the approval of the civil service commission having jurisdiction, to a position other than a security position or to an agency other than a security agency; or suspend without pay any officer or employee under his or its appointive jurisdiction occupying a security position or a position in a security agency, whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in

such position would endanger the security or defense of the nation and the state."

*Section 4 contains the provisions as to disqualification of applicants or eligibles.

The balance of the suspension and dismissal section (§ 5) contains the provisions for notification to the employee of the action taken and of the steps he may then take. They are as follows: "The officer or employee with respect to whom such action was taken shall be notified that such action was taken pursuant to this section and, to the extent possible without disclosing confidential sources of information of law enforcement agencies, or agencies empowered or required by law to investigate subversive activities or disloyalty, the reasons for such action. Within thirty days after such notification, such person shall have an opportunity to submit statements or affidavits to show why he should be reinstated or restored to duty. Following such further investigation and review as he or it shall deem necessary, the officer, board, body or commission taking such action shall affirm the transfer or terminate the employment of such officer or employee if he or it shall find, that, upon all the evidence, reasonable grounds exist for the belief that, because of doubtful trust and reliability, the employment of such person in a security position or in a security agency would endanger the security or defense of the nation and the state. If the officer, board, body or commission finds no reason to warrant the transfer or removal of such officer or employee, he shall be restored to his position and if such officer or employee has been suspended
78 from his position, he shall, upon restoration, be entitled to back pay for the period of his suspension."

Section 6 provides for appeal to the State Civil Service Commission by any person who believes himself aggrieved by a determination under sections 4 or 5, and the proceedings to be had upon such appeal.

Section 7 deals with evidence which may be considered in proceedings under the act. It declares that finding of disqualification (under § 4) and a determination of suspension, removal or transfer from the position (under § 5)

may be based upon evidence of previous conduct, which may include "to the extent deemed appropriate," but shall not be limited to evidence of "four forms of conduct. One of these is "membership in any organization or group found by the state civil service commission to be subversive."

Section 8 provides that a subversive group or organization, as used in the law, shall be one found by the State Civil Service Commission, after inquiry and appropriate notice and hearing, to advocate the overthrow of the government by force and violence, or so designated by the United States Attorney General or by the State Board of Regents pursuant to the Feinberg Law (Education Law, § 3022), provided these designations were made upon notice to the organization or group and opportunity afforded to answer.

Section 2 defines "security agency" as meaning: " * * * any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential information relating to the security or defense of the nation and the state may be available."

The section defines "security position" as: " * * * (1) any office or position in the public service which requires the performance of functions which are necessary to the security or defense of the nation and the state; or (2) any office or position in any public agency or department where confidential information relating to the security or defense of the nation and the state may be available."

Section 3 provides how it shall be determined what is a security agency or security position: "Upon its own initiative or whenever requested by the head of any department, bureau, division or other agency of the state government, or by any municipal civil service commission, or board, or body, authorized by law to conduct examinations and certify eligibles for positions in the service of the state or its civil divisions, the state civil service commission shall determine whether or not (1) an agency is a security agency within the meaning of section two (a) of this act, or (2) a position is a security

79 position within the meaning of section two (b) of this act. Such determination by the state civil service commission shall be subject to review by the courts in accordance with the provisions of article seventy-eight of the civil practice act."

On November 23, 1953 the State Civil Service Commission declared the New York City Transit Authority to be a security agency within the meaning of the Security Risk Law. On March 24, 1954 by resolution the commission listed the Communist party of the United States and of the State of New York as subversive within the meaning of the Security Risk Law. This was based upon and was an adoption of such listing of the Communist party by the State Board of Regents under the Feinberg Law.

The facts as to petitioner's discharge under the Security Risk Law have been set forth above.

On this appeal the following basic questions are presented:

(1) Whether the New York City Transit Authority is a "board, body or commission of the state or of any civil division thereof" within the intendment of the Security Risk Law and whether the city commission of investigation had jurisdiction to conduct the inquiry;

(2) Assuming that the answer to (1) be in the affirmative, whether the Transit Authority was properly designated a "security agency";

(3) Assuming that the answer to (2) be also in the affirmative, whether the Security Risk Law authorizes the Transit Authority to suspend and discharge one occupying the position of subway conductor in such security agency merely upon a showing that, when asked if he was *then* a member of the Communist party, he refused to answer, and then gave as a reason for so refusing, that to answer might tend to incriminate him within the meaning of the Constitution, and

(4) Assuming that the answer to (3) be also in the affirmative, whether the Security Risk Law is constitutional.

We shall treat of the questions seriatim.

The New York City Transit Authority was created by the Legislature as a "body corporate and politic constituting a public benefit corporation". (Public Authorities Law, § 1801, subd. 1.) It operates the transit facilities owned by the City of New York. It is comprised of three members, one of whom is appointed by the Mayor of the City of New York, one by the Governor of the State and the third member (who shall be chairman of the board) appointed by the first two members after their appointment and qualification. Neither the chairman nor any member shall hold any other paid public office or employment under the Government of the United States, of the State of New York or of the City of New York. The Authority performs the vital function previously vested in the Board of Transportation of the City of New York, which was a city agency and eligible to be declared a security agency.

80 It is clear that the danger to government to be anticipated from the activities of a subversive individual in the employ of the Transit Authority is no different from the danger to government to be anticipated from such individual if he were still in the employ of its predecessor body, the Board of Transportation. We think it also clear that the purpose of the Legislature in enacting the Security Risk Law was to protect the government and those public authorities performing vital functions of government from the peril of infiltration of subversive individuals into the public service. Accordingly, in our judgment, the Transit Authority is a "board, body or commission of the state or of any civil division thereof" within the intendment of the Security Risk Law.

The petitioner argues that the city's interest in the transit system is that of lessor of the physical properties only, and that such interest does not justify its interrogation of employees of the Transit Authority. We do not agree.

The City of New York is empowered, through the commissioner of investigation, to investigate and inquire into all matters of concern to the city or its inhabitants (see General City Law, § 20, subd. 21; § 23, subd. 1; New York City Charter, § 803). As we have said, the City of New

York owns the rapid transit facilities which constitute the New York City Transit System. In June of 1953 those facilities were leased by the city to the Transit Authority for a period of 10 years. Under the lease the city is required to pay the costs of the capital improvements on the transit system and, so, the city has a proprietary interest in preserving and protecting those facilities from sabotage or destruction. Moreover, it cannot be doubted that the very existence of the city is dependent upon the safe and uninterrupted operation of the transit system. Certainly, an investigation to determine whether employees of the transit system are members of subversive organizations or are of doubtful trust and reliability is "in the best interests of the city" (New York City Charter, § 803, subd. 2). That being so, the investigation here involved was properly initiated by the commissioner of investigation (see *Matter of Cherkis v. Impellitteri*, 307 N. Y. 132, 148).

The Public Authorities Law confers upon the Transit Authority the right to avail itself of the services of the officers and agencies of the city government (see Public Authorities Law, § 1803, subd. 3, par. b). The Authority must be said to have exercised its right to make use of the services of the commissioner of investigation and, in effect, to have authorized said commissioner to conduct the investigation on its behalf, when it directed the petitioner to appear before the commissioner to answer questions designed to ascertain whether he was of doubtful trust and reliability. Under the Security Risk Law the Authority is not required to make its determination upon evidence developed as a result of its own investigation—it has the right to consider and weigh evidence from any source.

We turn now to the question of whether the Transit Authority was properly designated a "security agency."

The law defines the term "security agency" as follows: "(a) The term 'security agency' as used in this act shall mean any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential informa-

tion relating to the security or defense of the nation and the state may be available."

The Transit Authority performs a function necessary to the security or defense of the nation and the state. This fact was vividly demonstrated recently when certain New York City subway motormen went out on strike. Mr. Justice LUBIANO, Special Term, New York County, in issuing an injunction against those motormen, aptly pointed out (*New York City Tr. Auth. v. Loos*, 2 Misc 2d 733, 738): "It is easy to forget, while the subways are running, that there is room for motor vehicles on the streets only because millions travel by subway; for if all persons had to use surface transportation, the bridges and tunnels and main highways would soon be hopelessly clogged. New York with its immense territory and its five separate boroughs, all protected by unified police and fire departments and having many other integrated services, is dependent for its very life and daily functioning, and for the immediate safety of its 8,000,000 inhabitants, on rapid transit facilities which are necessarily used by nearly all persons engaged in all of its governmental and other vital functions. Whatever may be the case elsewhere, and under other conditions, whatever may have been the case in other times, here and now, and for this city, the operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare. It is worth re-emphasizing that the subways are the city's arteries upon which its life and daily living depend. . . ."

We consider it clear, therefore, that the Transit Authority has been properly denominated a "security agency".

The Appellate Division, in concluding that the petitioner's refusal to answer the question posed constituted sufficient justification for his dismissal under the Security Risk Law, wrote:

"We apprehend that if a statute, such as the 82 Los Angeles ordinance* permitting discharge of a

* In *Garner v. Los Angeles Bd.* (341 U. S. 716), the Supreme Court of the United States upheld an ordinance of the City of Los Angeles which required

public employee for refusal to execute an affidavit of the character there required, is valid and justifies his discharge for that reason, it is proper for a security agency, charged with the duty of determining whether an employee is of doubtful trust and reliability from a security standpoint, to inquire into those matters and, if the employee refuses to answer, it may not be said that the agency is not empowered to find that such refusal, in and of itself, furnishes reasonable grounds for a belief that he is not a good security risk. It is our view that the correct construction has been placed on the Security Risk Law by the Transit Authority and by the Special Term."

Petitioner contends that the Legislature in enacting the Security Risk Law intended that a security risk agency must have a hearing at which it introduces evidence against the employee before it may find the employee to be a security risk and that it may not discharge the employee for mere failure to answer the question as to Communist party membership. The respondents, on the other hand, contend that the refusal to reply to the crucial question as to Communist party membership is "evidence" of "doubtful trust and reliability", which is the ground for discharge under the Security Risk Law. They point out that the petitioner was not discharged on the ground that he was a Communist party member. He was discharged

every employee to execute an affidavit, stating whether or not he was or ever had been a member of the Communist party or the Communist Political Association. Mr. Justice CLARK, writing for the court, said (p. 720):

"The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid." This reasoning, it seems to us, is determinative of the case presently before us.

for having created a doubt by declining to answer whether he was or was not a member.

We agree with the respondents.

It seems to us that it would be more clear if we suppositionally divided the conduct of petitioner into two parts. The first, when he was asked by his employer whether he was then a member of the Communist party. That 83 question he refused to answer. He then left the room. Certainly by that conduct he would have given evidence of his own untrustworthiness and unreliability. Suppose then, as the second part of his conduct, he returned five minutes later and told the commissioner of investigation that he had refused to answer his question because to do so might tend to incriminate him. May not the employer discharge an employee who refuses to answer his proper question? If the petitioner, in the case supposed, had not returned to the commissioner five minutes later and given a reason for his conduct, we think all would agree that he was properly discharged. Does it change the situation because he returns to say that he refused to answer because to do so might tend to incriminate him? Does that explanation destroy the evidence which he has given to his employer of his untrustworthiness and unreliability as a security risk? Does the explanation *require* that the employer consider without any doubt that the employee by his explanation has again become trustworthy and reliable as a security risk as a matter of law? We think not.

The intent of the Security Risk Law was to set up a removal procedure which would provide a more ready means of removing security risks from public service than sections 22 or 12-a of the Civil Service Law. This is apparent from the fact that even under the Civil Service Law an employee, refusing to answer questions put to him by his employer pertaining to his official conduct, may be removed, after a hearing, under a charge of insubordination without any showing by the employer of the information which prompted the inquiry.

The contentions of the petitioner (1) that the Security Risk Law is unconstitutional because an emergency no longer existed in 1954 when the petitioner was dismissed since the Korean War had ended and (2) no emergency

could conceivably justify the dismissal of the petitioner because his position as a conductor could have no rational connection with national security, are untenable.

As to (1) all that need be said is that the wisdom of the Legislature in extending the Security Risk Law beyond the period of the Korean War has been confirmed by world events transpiring since the Korean Truce.

As to (2) we are in accord with respondents that the importance of the petitioner's position to the security of the State and of the City of New York can be readily seen when it is considered that in modern warfare the civilian population may well be a prime target. A bombing raid on New York City would undoubtedly be planned for a time when the maximum number of people would be in the city. The most important facility for the evacuation of the people would be the subway system. If the petitioner were a member of the Communist conspiracy

84 he would, as an employee of the transit system in charge of a train, as conductors are, be a very real threat to the security of the State and of the city.

It may be argued that one conductor can do very little harm. The answer to that argument, however, is to be found in the words of Mr. Justice JACKSON in his concurring opinion in *Dennis v. United States* (341 U. S. 494, 564): "The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in *transportation*, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members. It also seeks to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion." (Emphasis supplied.)

The final question pertains to the constitutionality of the Security Risk Law, as thus construed and applied to petitioner.

The petitioner contends that the case of *Slochower v. Board of Educ.* (350 U. S. 551) is controlling authority for the proposition that the Security Risk Law, as so construed, is unconstitutional.

In distinguishing the *Slochower* case, the majority of the Appellate Division concluded that the holding there was merely that a teacher in a city college, entitled to tenure, and who could be discharged only for cause and after notice, hearing, and appeal, could not be mandatorily and summarily dismissed *solely* on the ground that he invoked the protection of the Fifth Amendment before a Congressional committee conducting an inquiry not directed at the property, affairs, or government of the city or the official conduct of city employees. In further distinguishing the *Slochower* case, the Appellate Division said, in part: " . . . We apprehend that in view of the manner in which the court stressed the 'remoteness of the period to which they [the questions] are directed,' the failure of the statute to provide an opportunity to explain the reason for refusal to answer and, more particularly, the nature of the inquiry being conducted by the Federal committee, that decision must be strictly limited to its own peculiar facts. The reference to the *Garner* case is some indication that, had Professor Slochower's refusal to answer occurred before a duly constituted body investigating the affairs of the board of higher education or of Brooklyn College, a different result would have been reached even under section 903 of the charter."

85 We believe that the Appellate Division has properly distinguished the *Slochower* case (*supra*) from the present case. In that case the majority of the Supreme Court said (350 U. S. 551, 558):

"As interpreted and applied by the state courts, it [New York City Charter, § 903] operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence

or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibitions of *Wieman v. Updegraff, supra*.

"It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or . . . official conduct of city employees.' In this respect the present case differs materially from *Garner*, where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information."

Here, the city was conducting an investigation to determine whether any employees of the Transit Authority were of doubtful trust and reliability; such investigation was properly instituted in the best interests of the city; the question asked was not remote, it was as to petitioner's *then* membership in the Communist party—a continuing conspiracy against our form of government; no inference of membership in that party was drawn from petitioner's refusal to reply to the question asked and, finally, the petitioner was given an opportunity to explain why he had chosen not to answer the question. Petitioner was not discharged for invoking the Fifth Amendment; he was discharged for creating a doubt as to his trustworthiness and reliability by refusing to answer the question as to Communist party membership.

In the *Slochower* case it was the plea of the Fifth Amendment, *and that alone*, causing automatic dismissal which the Supreme Court condemned. The Security Risk Law does not so operate. When the employee refuses to tell his employer whether he is a mem-

ber of the Communist party, surely he is giving evidence of "reasonable grounds" for doubt as to whether, as Mr. Justice BRENNER said in the Special Term opinion, he "might be" a member; he is giving "reasonable grounds" for "doubt" about his trustworthiness and reliability as a security risk. If, in refusing, the employee injects his claim of privilege under the Fifth Amendment, that circumstance is incidental or additional. The dismissal is still proper for refusing that vital, fundamental information. Were that not so, this would be the result: An employee may be dismissed for refusing to give information as to whether or not he is a Communist party member (*Garner v. Los Angeles Bd.; supra*), but if with his refusal he draws into or adds to his words of refusal a claim that to answer might tend to incriminate him and he, therefore, claims the privilege to refuse to answer under the Fifth Amendment to the United States Constitution, he may not be dismissed. That cannot be.

The petitioner also argues that he asserted his constitutional privilege with respect to a Federal crime and as a part of his national citizenship so that his dismissal abridged his privileges and immunities as a citizen of the United States. It seems to me that such an argument is untenable in a situation such as this where the employee uses the privilege to thwart his employer in ascertaining whether or not he is a member of a criminal conspiracy. In the *Slochower* case (*supra*), as we have pointed out, the Supreme Court indicated that when the questions are asked by the city the employee has an obligation to answer.

The order of the Appellate Division should be affirmed, with costs.

FULD, J. (dissenting). While I am not unmindful of the public interest to be served by ridding government of the subversive and the security risk, I cannot join in the courts decision, for, in my view, the appellant's discharge from his job of subway conductor was effected in disregard of the applicable statute and in violation of constitutional right.

The Security Risk Law was enacted in 1951, as a temporary emergency measure (L. 1951, ch. 233), in response to the Communist aggression in Korea the year before

(§ 1). In substance, it authorizes "Any public officer, board, body or commission of the state or of any civil division thereof" to discharge or suspend "any officer or employee under his or its appointive jurisdiction occupying a security position or a position in a security agency, whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security 87 or defense of the nation and the state" (§ 5).¹ A

"security agency" is defined as any agency or unit of government where "functions are performed which are necessary to the security or defense of the nation and the state" or where "confidential information relating to the security or defense of the nation and the state may be available." A "security position" is a post in the public service "which requires the performance of functions which are necessary to the security or defense of the nation and the state" or one in any public agency or department "where confidential information relating to the security or defense of the nation and the state may be available" (§ 2). To the State Civil Service Commission is delegated the authority of determining whether an agency is a security agency or whether a job is a security position within the meaning of the statute (§ 3).

It is open to grave doubt that the New York City Transit Authority, set up as a "body corporate and politic constituting a public benefit corporation" (Public Authorities Law, § 1801, subd. 1), may be regarded as an agency "of the state or of any civil division thereof" within the ambit of the act before us (Security Risk Law, § 5). It

1. Another provision recites that the finding required by section 5 "may be based upon evidence of the previous conduct of the . . . officer, or employee . . . which may include to the extent deemed appropriate, but shall not be limited to evidence of (a) previous unauthorized disclosure of confidential information; (b) the commission or attempt to commit an act or acts designed to or tending to undermine, sabotage, hamper or obstruct a program adopted by the agency or department by which he is employed or which affects the security or defense of the nation and the state; (c) treasonable or seditious conduct; and (d) membership in any organization or group found by the state civil service commission to be subversive" (§ 7; emphasis supplied).

is likewise dubious that the Transit Authority may correctly be labeled a "security agency" within the statute's definition (§ 2, subd. [a]). However, I put these troublesome doubts to one side, since I am thoroughly persuaded that, in any event, the Security Risk Law may not be stretched, under the circumstances of this case, to reach the appellant whose duties are to open and close the doors of subway trains.

Parlous though the times, the anticipation of risks to "the security or defense of the nation and the state" (§ 5) from a person in the appellant's position strikes me as a submission to unreasoning fear rather than a rational basis for administrative action. (Cf. *Cole v. Young*, 351 U. S. 536; *Matter of Pinggera v. Municipal Civil Service Comm.*, 206 Misc. 615.) The job of opening and closing the doors of a subway train is hardly one of the "strategic posts in transportation" to which Mr. Justice JACKSON adverted in *Dennis v. United States*, 341 U. S. 494, 564 (see opinion of CONWAY, Ch. J., *ante*, p. 970). Of course, all men possess a capacity to do injury, but, to pose a risk to 88 security or defense, one's potential for harm must be greater, more distinctive, than this appellant's; no less danger or risk is to be anticipated from any one of the millions of persons who periodically ride the subways as passengers.²

However, even if the statute were to be held to apply to the appellant, his dismissal cannot be sustained without violating his right to due process of law under both state

2. It should, of course, be noted that in appellant's case the statute's careful definition and examples of a "security position" have been entirely ignored. It is argued that they are irrelevant because the State Civil Service Commission has designated the Authority a "security agency," thereby converting its every post into a "security position," but I find no justification in the statute for such action. (Cf. *Cole v. Young*, *supra*, 351 U. S. 536.)

Indeed, the record tells us nothing of the steps taken by the commission in reaching its determination. Moreover, we are left completely in the dark as to whether the appellant or others affected were notified that the matter was under consideration, or even that the determination had been made. (Security Risk Law, §§ 2, 3; cf. *Anti-Fascist Comm. v. McGrath*, 341 U. S. 123, 165 *et seq.*, per FRANKFURTER, J., concurring) We are not even told where the determination of the commission is to be found or whether any opportunity was afforded for the prescribed judicial review (§§ 3, 4; cf. *Adler v. Board of Educ.*, 342 U. S. 485, 490).

and federal constitutions (N.Y. Const., art. 1, § 6; U. S. Const., 14th Amdt.).³

The statute, as noted, requires a finding based "upon . . . evidence" that, "because of doubtful trust and reliability, the employment of [the] person . . . [in question] would endanger the security or defense of the nation and the state" (§ 5). The only "evidence" in support of the Transit Authority's finding "of [appellant's] doubtful trust and reliability" consisted of his refusal, on the basis of the constitutional privilege against self incrimination, to answer questions put to him by the city commissioner of investigation relating to membership in the Communist party. Apart from his constitutionally protected silence, there was not the slightest evidence or predicate in the record for any inference that he was a member of that organization, that he was of doubtful trust or reliability or that his continued employment would prove dangerous to state or nation.

It is important at the outset to observe that we have here no question whether the state could with propriety, by a clearly worded statute, impose an absolute duty upon public officers or employees to answer questions relating to their official conduct as a condition of continued employment. (See New York City Charter, § 903; N. Y. Const., art. 1, § 6; cf. *Garner v. Los Angeles Bd.*, 341 U. S. 716.) The statute before us, essentially different, imposes no such condition. Instead, it authorizes dismissal only upon "evidence" that the particular officer or employee is of such "doubtful trust and reliability" as to endanger the "security" or "defense" of the nation and the state. The narrow issue here presented, therefore, is whether the appellant's exercise of his constitutional right to remain mute may serve as the basis for inferring the existence of the facts prescribed by the statute as a condition of discharge.

Slochower v. Board of Educ. (350 U.S. 551), though concerned with a different statute and a somewhat different situation, seems to me decisive that such an inference may

3. In the view thus taken, I have no occasion to consider the appellant's further reliance upon the privileges and immunities clause of the Fourteenth Amendment—though I am inclined to agree with the court's conclusion that that clause is not here applicable. (Cf. *Adamson v. California*, 332 U. S. 46; *Slochower v. Board of Educ.*, 350 U. S. 551, 555.)

not be drawn from the mere assertion of the privilege. The Supreme Court there held; and in unmistakable terms announced, that an imputation of guilt from the claim of privilege would constitute "arbitrary action" violative of the "very essence of due process" (p. 559).

Firmly established as "one of the great landmarks in man's struggle to make himself civilized" (Griswold, *The Fifth Amendment Today* [1955], p. 7), the privilege against self incrimination stands as a bulwark for the protection of persons accused, as well as of witnesses, who, though entirely innocent of any wrongdoing, may have a reasonable and honest fear of prosecution. Recognition of this fundamental right demands that it be freely exercisable without undue restraint or invidious consequences. As the Supreme Court declared in *Slochower* (350 U.S., at p. 557):

"At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' *Brown v. Walker*, 161 U. S. 591, 610. We have reaffirmed our faith in this principle recently in *Quinn v. United States*, 349 U. S. 155. In *Ullman v. United States*, 350 U. S. 422, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."

90 It is urged that the *Slochower* decision is not in point, since the Supreme Court itself there noted that the case involved the assertion of the privilege in an investigation conducted by a "federal committee" rather than by "city authorities" (p. 558). That observation, however, in no way operated to lessen the force either of the Supreme Court's sweeping condemnation of "the practice of imputing a sinister meaning to the exercise of a

person's constitutional right under the Fifth Amendment" or of the court's solemn affirmation that that right "would be reduced to a hollow mockery if its exercise" could be twisted into a confession of guilt or disloyalty.

Yet that is precisely the vice of what was done in this case. It is contended that a public officer or employee, unlike the general citizenry, may properly be found to be at least "of doubtful trust and reliability," if not actually disloyal, where he claims his right to refuse to answer questions relating to his possible association with a subversive organization. Whether, however, the refusal be taken as an admission of his membership in such organization or merely as engendering a doubt as to his reliability, the fact remains that in either instance an adverse, "sinister" inference, fraught with serious consequences, is attempted to be drawn from the invocation of the constitutional privilege. Based as it was solely upon his exercise of the privilege, the appellant's discharge constitutes "arbitrary action" within *Slochower*, regardless of the formal difference in the labels employed. Any other conclusion would be strange indeed: to treat reliance upon a fundamental constitutional guarantee as proof of "untrustworthiness and unreliability" is anomalous, a veritable contradiction in terms.

The point is made that the appellant should have availed himself of the opportunity afforded by the statute of submitting statements or affidavits "to show why he should be reinstated or restored to duty" (Security Risk Law, § 5). As I read the record before us, the "opportunity" was illusory, a Hobson's choice. His alternatives were either to repeat his reliance upon the constitution or to forego that right, to reassert his privilege or to capitulate and answer the question. His failure to make the choice is, consequently, irrelevant.

There is ever a need to achieve a balance between government security and the traditional rights of the individual. That balance has been destroyed by the way in which the statute before us has been applied. It is a delusion to think that the nation's security is advanced by the sacrifice of the individual's basic liberties. The fears and doubts of the moment may loom large, but lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees.

"Historic liberties and privileges," this court declared some twenty-five years ago (*Matter of Doyle*, 257 N. Y. 244, 268), "are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' (HOLMES, J., in *Northern Securities Co. v. United States*, 193 U. S. 197-400), are not to change their form and content in response to the 'hydraulic pressure' (HOLMES, J., *supra*) exerted by great causes."

I would reverse the orders of the courts below.

VAN VOORHIS, J. (concurring in part with FULD, J.). In my view this was a "sensitive" employment, but petitioner was discharged upon the sole ground specified in the Security Risk Law, viz., that he was a bad security risk: in the legislative language, that his retention in this position "would endanger the security or defense of the nation and the state" (L. 1951, ch. 233, § 5, as extended). He was not charged with insubordination in refusing to answer questions relating to matters that might affect his qualifications for his work by reason of past or present affiliations. He was discharged upon an affirmative finding of fact that he was a bad security risk, of which there was no evidence except that he had invoked the Fifth Amendment. I concur in the part of Judge FULD's opinion in which he reasons that invoking the Fifth Amendment does not have probative force to establish that petitioner has engaged in subversive conduct or to establish that in his position of employment he "would endanger the security or defense of the nation and the state", and that using it as evidence thereof constitutes a denial of due process of law.

For these reasons, in my judgment, the order appealed from should be reversed.

DESMOND, DYE, FROESSEL and BURKE, JJ., concur with CONWAY, Ch.J.; FULD, J., dissents in an opinion in which VAN VOORHIS, J., concurs, in part, in a separate memorandum.

Order affirmed.

92 IN THE COURT OF APPEALS OF NEW YORK

93 No. 306

In the matter of the

Application of MAX LERNER, *Appellant*,
For an Order &c.,

vs.

HUGH J. CASEY, & ors., constituting the New York City
Transit Authority, *Respondents*.

Remittitur—February 28, 1957

BE IT REMEMBERED, That on the 18th day of October in the year of our Lord one thousand nine hundred and fifty-six, Max Lerner, the appellant in this cause, came here unto the Court of Appeals, by Leonard B. Boudin, his attorney, filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Hugh J. Casey, & ors., constituting the New York City Transit Authority, the respondents in said cause, afterwards appeared in said Court of Appeals by Daniel T. Scannell, their attorney. Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

94 WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Leonard B. Boudin, of counsel for the appellant, and by Mr. Daniel T. Scannell, of counsel for the respondents, and by Miss Ruth Kessler Toch, of counsel for the Attorney General of the State of New York, pursuant to Section 71 of the Executive Law, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

95 THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Clerk of the Court of Appeals of the State of New York.
RAYMOND J. CANNON,

96 IN THE SUPREME COURT OF NEW YORK
COUNTY OF KINGS

Judgment on Remittitur—March 11, 1957

The above named petitioner having appealed to the Court of Appeals of the State of New York from an order entered in the Office of the Clerk of the Appellate Division, Second Department on the 25th day of June, 1956, and filed in the Office of the County of Kings on the 27th day of June, 1956, which affirmed an order of Supreme Court Justice Benjamin Brenner entered in the Office of the Clerk of the County of Kings on the 29th day of January, 1955, denying petitioner's application and granting respondents' motion to dismiss the petition and the

97 proceeding herein; and said appeal having been duly argued in said Court of Appeals and said Court of Appeals having ordered and adjudged that said order so appealed from as aforesaid be affirmed with costs, and having ordered that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law;

Now on reading and filing the remittitur from the Court of Appeals herein and upon motion of Daniel T. Seannell, attorney for the respondents herein, it is hereby

ORDERED that the order and adjudication of said Court of Appeals affirming said order of the Appellate Division with costs, be and the same hereby is made the order and adjudication of this court.

ENTER

JOHN E. CONE, JR.
J.S.C.

Granted... March 11, 1957.

JOSEPH B. WHITTY,
Clerk.

98 IN SUPREME COURT OF THE STATE OF NEW
YORK, COUNTY OF KINGS

In the Matter of the Application of
MAX LERNER, *Appellant*, for an Order under Article 78 of
the Civil Practice Act,

against

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN,
HENRY K. NORTON and DOUGLAS M. MOFFAT, constituting
the New York City Transit Authority, *Respondent*.

Notice of Appeal to the Supreme Court of the United States—
April 23, 1957

SIRS:

I.

NOTICE IS HEREBY GIVEN that Max Lerner, the above named appellant, hereby appeals to the Supreme Court of the United States from the final decree of the Court of Appeals of the State of New York affirming the dismissal of appellant's petition for an order directing the appellees to restore appellant to his position as subway conductor. The final decree of the Court of Appeals of the State of New York was entered in this proceeding on February 28, 1957.

This appeal is taken pursuant to 28 U.S.C., § 1257 (2).

II.

The Clerk of the Supreme Court of the State of New York, County of Kings, will please prepare a transcript

of the record in this cause and include in said transcript the following:

The Papers on Appeal in this proceeding to the Court of Appeals of the State of New York.

The remittitur from the Court of Appeals, dated February 28, 1957..

99 The opinions in the Court of Appeals.

The order of this Court, dated March 11, 1957, making the order of the Court of Appeals the order of the Court.

This Notice of Appeal.

III.

The following questions are presented by this appeal:

1. Whether the dismissal from public employment of a subway conductor with tenure contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States where such dismissal is upon the ground that he is a security risk, the sole evidence thereof being his invocation of his constitutional privilege against self-incrimination.

2. Whether the dismissal of the said employee for "Activities . . . which give reasonable ground for belief that he is not a good security risk," contravenes the due process clause of the Fourteenth Amendment, where he was never served with charges of such activities, there was no hearing, and he has never been informed of the nature of the "activities."

3. Whether the discharge of a subway conductor for membership in the Communist Party violates his right to freedom of speech, assembly and association under the Fourteenth Amendment to the Constitution of the United States when such membership is at most inferred from his invocation of the constitutional privilege and scienter is not charged.

4. Whether the appellant's privilege against self-incrimination under the Fifth Amendment to the United States Constitution and his immunities and privileges under the Fourteenth Amendment thereto were abridged by his dismissal from public employment because he had asserted

100 his constitutional privilege in a proceeding conducted by state authorities in pursuance of the federal government's security program.

5. Whether the state court's interpretation and application herein of the privilege against self-incrimination under the State Constitution, Article I, § 6, is not so restrictive and inconsistent with that court's liberal construction and application of the privilege in cases involving public officials, members of the bar and other persons as to deny the appellant the equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

6. Whether the determination that appellant's work was "necessary to the security and defense of the nation and the state" was in violation of his right to due process under the Fourteenth Amendment when the making of such determination was without notice to appellant and without evidence or hearing, and, further, was arbitrary and unreasonable in view of the nature of his duties.

7. Whether the appellant has not been denied due process under the Fourteenth Amendment to the United States Constitution when he was discharged from employment as a subway conductor by the New York City Transit Authority upon the basis of findings, *inter alia*, that the Communist Party was a "subversive organization" and that the New York City Transit Authority was a "security agency" within the meaning of the Security Risk Law, N. Y. Laws 1951, c. 233 as amended, when he was not a party to any proceeding making such findings and was not afforded, under the said statute, any opportunity to challenge such findings.

Dated: New York, N. Y.

April 23, 1957.

Yours, etc.,

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TO:

101

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102

103 SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 165

MAX LERNER, *Appellant,*

VS.

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN,
 ET AL.

APPEAL from the Court of Appeals of the State of New
 York.

Order Postponing Jurisdiction—October 14, 1957

The statement of jurisdiction in this case having been submitted and considered by the Court; further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is assigned for argument immediately following No. 63. One hour and a half is allowed for argument in each case.

105 SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 165

MAX LERNER, *Appellant*,

VS.

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN,
ET AL.**Order Granting Motion for Leave to Proceed in Forma
Pauperis—December 9, 1957**

ON CONSIDERATION of the motion for leave to proceed
further herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and
the same is hereby granted.

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JUN 4 1957

JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. ~~1059~~ / 165

In the Matter of the Application of

MAX LERNER,

Appellant,

For an Order Under Article 78 of the
Civil Practice Act,

against

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS
J. KLEIN, HENRY K. NORTON, and DOUGLAS
M. MOFFAT, constituting the New York City Transit
Authority,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
(a) Reports of the Opinions in the courts below	1
(b) The Grounds on which jurisdiction of the Supreme Court of the United States is invoked . .	2
(c) Questions presented by the appeal	3
(d) The material facts of the case	5
(e) The federal questions are substantial	8
(1) The statute denies appellant due process under the Fourteenth Amendment	8
(2) The discharge violated appellant's freedom of speech, belief, assembly and association under the Fourteenth Amendment	11
(3) The statute impaired appellant's constitutional privilege against self-incrimination under the Fifth Amendment and his privileges and immunities under the Fourteenth	13
(4) The construction of the statute and State Constitution denies appellant the equal protection of the laws	14

APPENDIX:

The Statute	17
Opinion of Court of Appeals	25
Order Appealed From	49

Table of Cases

Adamson v. California, 332 U. S. 46	14
Adler v. Board of Education of the City of New York, 342 U. S. 485	11
American Communications Association v. Douds, 339 U. S. 382	12

Cole v. Arkansas, 333 U. S. 196	10
Cole v. Young, 351 U. S. 536	5, 12
Commonwealth of Pennsylvania v. Nelson, 350 U. S. 497	13
Daniman v. Board of Education, 306 N. Y. 532	15
DeJonge v. Oregon, 299 U. S. 353	11
Gambino v. U. S., 275 U. S. 310	13
Garner v. Los Angeles Board, 341 U. S. 716	3, 9
Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117	9
Hamilton v. Regents of the University of California, 293 U. S. 245	2
Herndon v. Lowry, 301 U. S. 242	12
In re Grae, 282 N. Y. 428	14
In re Oliver, 333 U. S. 257	9
Jack v. Kansas, 199 U. S. 372	14
Joint Anti-Fascist Committee v. McGrath, 341 U. S. 123	10
Königsberg v. State Bar of California, 77 S. Ct. 722	8, 9, 10, 11, 15
Matter of Doyle, 257 N. Y. 244	14
Matter of Fusco v. Moses, 304 N. Y. 424	15
Matter of Greenbaum v. Bingham, 201 N. Y. 343....	15
Matter of Kaffenburgh, 188 N. Y. 49	14
Matter of Meyer v. Goldwater, 286 N. Y. 461	15
McCullum v. Board of Education, 333 U. S. 203	2
Morgan v. United States, 304 U. S. 1	9
Parker v. Lester, 235 Fed. 2d 787 (C. A. 9)	10
People v. Doyle, 1 N. Y. 2d 732	14
People v. Harris, 294 N. Y. 424	14
People ex rel. Packwood v. Riley, 232 N. Y. 283....	15
People ex rel. Taylor v. Forbes, 143 N. Y. 219	14
Quinn v. U. S., 349 U. S. 155	8, 15

Schware v. Board of Bar Examiners of the State of New Mexico, 77 S. Ct. 752	11
Sheiner v. Florida, 82 So. 2d 657	15
Shelley v. Kraemer, 334 U. S. 1	15
Slochower v. Board of Higher Education, 350 U. S. 551, rehearing denied, 351 U. S. 944	3, 6, 8, 15
St. Joseph Stock Yards Co. v. United States, 298 U. S. 38	9
Twining v. New Jersey, 211 U. S. 78	14
Wieman v. Updegraff, 344 U. S. 183	2, 11, 12

Constitution, Statutes and Regulations

State Constitution:

Article I, § 6	4, 14
28 U. S. C. § 1257(2)	2
McKinney's Unconsolidated Laws of State of New York	3
New York Laws 1954, c. 105	3
Security Risk Law of New York, N. Y. Laws 1951, c. 233	3, 4, 5
Security Risk Law, Sec. 6	11

Other Authority

Interim Report of Committee on Public Employee Security Procedures, p. 22	10, 12
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Supreme Court of the United States

October Term, 1956

No.

In the Matter of the Application of

MAX LERNER,

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For an Order Under Article 78 of the
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HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN,
HENRY K. NORTON, and DOUGLAS M. MOFFAT, constituting
the New York City Transit Authority,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

JURISDICTIONAL STATEMENT

(a) Reports of the Opinions in the courts below.

This case was instituted by petition to the Supreme Court of the State of New York, Kings County. The application was denied and the petition dismissed. The opinion of the court is reported in 138 N. Y. Supp. 2d 777.

Appellant appealed to the Appellate Division of the Supreme Court of the State of New York, Second Judicial

Department, from the order denying the application and dismissing the petition. The Appellate Division (one of the five Justices dissenting) affirmed the order below. The opinions of the Appellate Division are reported in 2 App. Div. 2d 1, 154 N. Y. Supp. 2d 461.

An appeal from the order of affirmance was taken to the Court of Appeals of the State of New York. The Court of Appeals (two of seven Judges dissenting) affirmed the order of the Appellate Division. The opinions of the Court of Appeals are reported in 2 N. Y. 2d 355.

(b) The Grounds on which jurisdiction of the Supreme Court of the United States is invoked.

(i) The proceeding was instituted to review and annul the appellees' resolutions suspending and discharging appellant under the Security Risk Law of New York State, L. 1951, c. 233, as amended L. 1954, c. 105, from his position as subway conductor. The proceeding was brought pursuant to Article 78 of the Civil Practice Act of the State of New York relating to causes in the nature of mandamus and certiorari proceedings.

(ii) The decree sought to be reviewed was made by the Court of Appeals of the State of New York on February 28, 1957 and entered on the same day. The notice of appeal to the Supreme Court of the United States was filed on April 25, 1957 in the Supreme Court of the State of New York, Kings County.

(iii) Jurisdiction of the appeal is conferred on this Court by 28 U. S. C., § 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are: *Hamilton v. Regents of the University of California*, 293 U. S. 245; *McCollum v. Board of Education*, 333 U. S. 203; *Wieman v. Updegraff*, 344 U. S. 183; *Garner v. Los Angeles*

Board, 341 U. S. 716; *Slochower v. Board of Higher Education*, 350 U. S. 551, rehearing denied, 351 U. S. 944.

(v) The validity of the Security Risk Law of New York, N. Y. Laws 1951, c. 233 as extended, N. Y. Laws 1954, c. 105, as construed and applied by the New York Court of Appeals, is involved. The text of the statute appears in the Appendix.* It may also be found in McKimney's Unconsolidated Laws of the State of New York, §§ 1101-1108.

(c) Questions presented by the appeal.

1. Whether the dismissal from public employment of a subway conductor with tenure contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States, where such dismissal is upon the ground that he is a security risk, the sole evidence thereof being the invocation of his constitutional privilege against self-incrimination.

2. Whether his dismissal for "activities" which give reasonable ground for belief that he is not a good security risk" contravenes the due process clause of the Fourteenth Amendment, where he was never served with charges of such activities, there was no hearing, and he has never been informed of the nature of the "activities."

3. Whether his dismissal for possible membership in the Communist Party violates his right to freedom of speech, assembly and association under the Fourteenth Amendment to the Constitution of the United States when the possibility of such membership is inferred from his invocation of the constitutional privilege and *scienter* is not charged.

* Statutory references are to the sections as they appear in the Appendix.

4. Whether his privilege against self-incrimination under the Fifth Amendment to the United States Constitution and his immunities and privileges under the Fourteenth Amendment thereto were abridged by his dismissal from public employment because he had asserted his constitutional privilege in a proceeding conducted by state authorities in pursuance of the federal government's security program.

5. Whether the state court's interpretation and application herein of the privilege against self-incrimination under the State Constitution, Article I, § 6, is not so restrictive and inconsistent with that court's liberal construction and application of the privilege in cases involving public officials, members of the bar and other persons as to deny appellant the equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

6. Whether the determination that appellant's work was "necessary to the security and defense of the nation and the state" was in violation of his right to due process under the Fourteenth Amendment when the making of such determination was without notice to appellant and without evidence or hearing, and, further, was arbitrary and unreasonable in view of the nature of his duties.

7. Whether appellant has not been denied due process under the Fourteenth Amendment to the United States Constitution by reason of his dismissal upon findings, *inter alia*, that the Communist Party was a "subversive organization" and that the New York City Transit Authority was a "security agency" within the meaning of the Security Risk Law, N. Y. Laws 1951, c. 233 as amended, when he was not a party to any proceeding making such findings and was not afforded, under the said statute, any opportunity to challenge such findings.

(d) The material facts of the case.

Appellant Max Lerner was a subway conductor in the transit system of New York City since November 1, 1935. Appellees, constituting the New York City Transit Authority, a public benefit corporation, were his last employers. (N. Y. Public Authorities Law, § 1801.) Appellant's duties consisted of opening and closing subway car doors. He had tenure under the Civil Service Law of New York State.

On March 24, 1951, the Security Risk Law, *supra*, became effective, authorizing the summary discharge as security risks of employees in "security positions" or "security agencies" so designated by the State Civil Service Commission. The statute, modeled after that involved in *Cole v. Young*, 351 U. S. 536, defined such positions and agencies as those involving the performance of functions "necessary to the security or defense of the nation or the state" or "where confidential information" relating to such security might be available (§ 2).

The statute recited four examples of "previous conduct", evidence of which made one a security risk. One was "membership in any organization found by the State Civil Service Commission to be subversive" (§ 7).

On November 23, 1953 the Commission without notice, hearing or evidence designated the New York City Transit Authority a security agency. On March 24, 1954 the Commission designated the Communist Party a subversive organization under the Security Risk Law, adopting, without notice, hearing or evidence, the finding to that effect made by the New York State Board of Regents under the Feinberg Law, N. Y. Laws 1949, c. 360.

In September and October 1954, appellant, upon direction from his superiors, appeared before a Deputy Commissioner of Investigation of the City of New York. No charges had been served upon him; he was merely told

that an investigation was being conducted under the Security Risk Law and that he would be dismissed under § 903 of the New York City Charter if he refused to answer questions.* He was then asked whether he was or ever had been a member of the Communist Party and he declined to answer, relying upon his constitutional privilege against self-incrimination.

Appellant was thereupon suspended by appellees on the ground that he had invoked his constitutional privilege before the Deputy Commissioner of Investigation. The letter of suspension gave him thirty days to file an answering statement. Since the ground for suspension was limited to his invocation of the constitutional privilege, an act which was not denied, appellant made no further reply.

On November 24, 1954, appellant was discharged by the appellees on two grounds: first, that he had asserted his constitutional privilege and, second, that "further investigation has revealed activities on the part of Max Lerner which give reasonable ground for belief that he is not a good security risk."

The foregoing federal questions sought to be reviewed were raised by appellant in the state courts as follows:

Appellant's petition in the court of original jurisdiction alleged that the Security Risk Law as written and applied and the appellant's suspension and discharge were in violation of his federal constitutional rights (fols. 45-46). More specifically, it was alleged *inter alia* by appellant:

"The Security Risk Law is unconstitutional in that as written and as applied it is inconsistent with procedural due process. The charges which may be made thereunder are necessarily vague and indefinite. The standards set forth therein are similarly vague and indefinite. It provides for the considera-

* This representation with regard to dismissal was inaccurate since appellant was not employed by the City of New York. The Charter provision is that involved in *Slochower v. Board of Higher Education*, 350 U. S. 551.

tion of secret evidence and deprives one affected thereby of the opportunity to be confronted by witnesses or to rebut unfavorable testimony. The Security Risk Law is further unconstitutional in that, as written and as applied herein, it acts to deprive of substantive due process. Assertion of a constitutional privilege cannot be grounds for discharge from employment." (fols. 45-46)*

The federal questions sought to be reviewed were also raised in appellant's briefs in the Appellate Division and in the Court of Appeals of the State of New York.

The courts passed upon the questions raised by upholding the validity of the statute and appellant's suspension and discharge thereunder. The Court of Appeals expressly held that appellant's dismissal for assertion of his constitutional privilege against self-incrimination did not deny him procedural and substantive due process under the Fourteenth Amendment to the Constitution, did not violate his right to freedom of speech, assembly and association under the said Amendment, and did not violate his privilege against self-incrimination under the Fifth Amendment and his immunities and privileges under the Fourteenth Amendment (Appendix, pp. 34, 37-41).

The Court of Appeals did not discuss in its opinion two issues raised in appellant's briefs: (1) that he was denied the equal protection of the laws under the Fourteenth Amendment because of the discriminatory construction of the state constitutional privilege against self-incrimination and (2) that there was a denial of due process under the Fourteenth Amendment in the alternative ground for dismissal—namely, his "further activities", a term never explained by appellees. However, the issues were squarely raised and the holding of the Court of Appeals affirming the order below necessarily passed upon and rejected these contentions.

* Folio references are to the numbered folios of the papers on appeal to the Court of Appeals of the State of New York.

The dissenting opinions in the Court of Appeals held that appellant was deprived of his right to due process under the Fourteenth Amendment to the United States Constitution (Appendix, pp. 41, 43-48).

(e) The federal questions are substantial.

(1) The statute denies appellant due process under the Fourteenth Amendment.

A. The statute authorizes the discharge of a public servant with tenure upon *evidence* that "reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state" (§ 5).

The only so-called "evidence" in this case was appellant's refusal to answer questions as to membership in the Communist Party, based upon his constitutional privilege against self-incrimination. This case does not require any evaluation of conflicting evidence to determine if it "rationally supports a finding of doubt about his character or loyalty" (*Konigsberg v. State Bar of California*, 77 S. Ct. 722, 728) for appellees make no claim of such evidence.

The state court's conclusion that appellant was a bad security risk because he had asserted his constitutional privilege was "arbitrary action" violative of the "very essence of due process". *Slochower v. Board of Education*, 350 U. S. 551, 559. First, it gives "a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment" (*Slochower, supra*, at 557) which history, reason and this Court's most recent decisions condemn as irrational. *Quinn v. U. S.*, 349 U. S. 155. Secondly,

it imposes "undue restraint or invidious consequences" upon the exercise of the privilege (Fuld, J., dissenting, Appendix p. 45).

The refusal to answer questions is not evidence of wrongdoing or poor moral character. *Konigsberg v. The State Bar of California, supra*. Reliance upon the constitutional privilege against self-incrimination, indeed, is further legal justification for the refusal.

The state court's reliance upon *Garner v. Los Angeles Board*, 341 U. S. 716 was misplaced. (See Van Voorhis, J., dissenting, Appendix p. 47.) That case, unlike this one, involved an explicit statutory duty of disclosure; it did not hold that the refusal to answer was evidence of unreliability. See *Konigsberg v. The State Bar of California, supra*. The state court's attempt to distinguish *Slochower* upon the ground that the privilege was there asserted with respect to past Communist Party membership would establish a novel limitation upon the privilege. The court's reliance upon appellant's refusal to explain his assertion of the privilege would destroy its value.

B. Appellees' resolution dismissing appellant referred without any explanation to his "further activities." This action contravened appellant's right to due process under which he was entitled to (1) reasonable notice of the charges, *In re Oliver*, 333 U. S. 257, 273; *Morgan v. United States*, 304 U. S. 1; (2) "a fair and open hearing" on such charges, *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 73; *Morgan v. United States, supra*; *Goldsmith v. United States Board of Tax Appeals*, 270 U. S. 117 and (3) a decision indicating the nature of such activities.

Appellant has never received notice or charges of such "activities", has not been presented with evidence thereof and has not even been told what is intended by that language. The discharge for undisclosed reasons not the

subject of prior charges or hearing raises "questions of elemental fairness" as serious as those involved in *Konigsberg v. State Bar of California*, *supra*, p. 727; *Cole v. Arkansas*, 333 U. S. 196, 201, and *Parker v. Lester*, 235 Fed. 2d 787 (C. A. 9).

C. The State Civil Service Commission declared that the Transit Authority was a security agency, thereby avoiding the need to determine whether appellant's innocuous position as subway conductor had any relation to national security.

This designation was made following hearings conducted by the House Committee on Un-American Activities in New York State in 1953.* (See *Interim Report of Committee on Public Employee Security Procedures*, p. 22**). It was made without even the forms of quasi-judicial hearing and consideration or notice and opportunity to appellant and others to contest. It is therefore completely devoid of due process. *Joint Anti-Fascist Committee v. McGrath*, 341 U. S. 123.

D. Similarly, appellant was not notified and did not participate in any proceeding wherein it was found that the Communist Party was a "subversive organization." This designation was originally made by the Board of Regents of New York on September 24, 1953 pursuant to the New York Feinberg Law. (N. Y. Laws 1949, c. 360:

* Hearings, Committee on Un-American Activities, House of Representatives, 83d Congress, 1st Session, July 13 and 14, 1953 and April 7-9, 1954, in "Investigation of Communist Activities in the Albany, N. Y. Area".

** This Committee, appointed by Gov. Harriman on September 15, 1956 to study New York laws relating to the loyalty or security of public employees, made its report on January 28, 1957, criticizing the Commission for designating as security agencies governmental departments whose "immediate connection with the security and defense of the nation and the state is not readily discernible".

see *Adler v. Board of Education of the City of New York*, 342 U. S. 485.)

The Civil Service Commission, without holding any hearings, merely adopted the Regents' findings. The Security Risk Law, unlike the Feinberg Law, permits no employee challenge of such findings. Nor, unlike the Feinberg Law, does it limit discharges to persons who remain members after such findings, or require *scienter* before the dismissal of an employee. (cf. Security Risk Law, § 6 with the Feinberg Law, which makes membership only *prima facie* evidence of disqualification. *Adler v. Board of Education*, 342 U. S. at 485, citing 301 N. Y. 476 at 494.) In these respects appellant was denied procedural due process. *Wieman v. Updegraff*, 344 U. S. 183.

(2) The discharge violated appellant's freedom of speech, belief, assembly and association under the Fourteenth Amendment.

The state court inferred possible membership in the Communist Party from appellant's assertion of privilege. Quite aside from the impropriety of any such inference (*supra*, pp. 8-9), a discharge in 1954 of a subway conductor, even for proven membership, past or present, in the Communist Party, without more, would violate appellant's freedom of speech, assembly, belief and association under the Fourteenth Amendment. *Konigsberg v. State Bar of California*, *supra*, p. 730, and cases cited; *Schwartz v. Board of Bar Examiners of the State of New Mexico*, 77 S. Ct. 752, 758-760, and ftn. 13.

The right to join a political party or other organization and to participate in its meetings is guaranteed by the First Amendment and the due process clause of the Fourteenth. *DeJonge v. Oregon*, 299 U. S. 353. Government

employees are not stripped of constitutional right by virtue of their employment. *Wieman v. Updegraff*, *supra*, at 191-2.

The power of the state to suspend these constitutional guarantees depends upon actual necessity. *American Communications Association v. Douds*, 339 U. S. 382; *Herndon v. Lowry*, 301 U. S. 242, 258. There was no national emergency in 1954, a year after the end of the Korean War, which rationally could justify the summary discharge of a subway conductor for political reasons.

A subway conductor, whose duty it is to open and close subway doors, does not engage in work "necessary to the security or defense of the nation and the state" and does not handle "confidential information" relating thereto (§ 2). The designation of the New York City Transit Authority as a "security agency", thereby making every job in it a security position regardless of its nature (cf. *Cole v. Young*, 351 U. S. 536; Fuld, J., at Appendix, p. 43, fn. 2), was a highly improper circumvention of the statutory standard. Such a designation is not an adequate substitute for the actual necessity required to suspend the right of free political association guaranteed by the Fourteenth Amendment.*

* The currency and seriousness of the problem is indicated by the State Civil Service Commission's inclusion of paleontologists, probation officers and street cleaners in security positions or agencies. *Interim Report*, *supra*, p. 2, and by another agency's imposition of loyalty tests for fishing permits. N. Y. Times, May 7, 1957, p. 37.

More recently the Commission made a *volte face* in another case rendering meaningless the designation of an agency as a security agency by ruling that such designation did not affect every position in it (*Matter of the Appeal of Miriam Reif* (1957) [unreported]).

- (3) **The statute impaired appellant's constitutional privilege against self-incrimination under the Fifth Amendment and his privileges and immunities under the Fourteenth.**

The Security Risk Law was passed in aid of the federal government's national security program (§1). Governor Dewey's approving memorandum described the bill as "a temporary measure designed to insure the greatest possible cooperation of state agencies with federal agencies in providing for the defense of this country and supporting its policies in foreign affairs." (Governor's Memorandum, Unconsolidated Laws, §§ 1101 *et seq.* pocket part, p. 29).

The statute authorizes the Civil Service Commission (a) to accept under certain circumstances the United States Attorney-General's findings as to the subversive character of organizations (§ 8), and (b) to enter into contracts with the federal authorities "for the supplying of . . . assistance necessary for the performance of its duties pursuant to this act" (§ 9).

The Deputy Commissioner of Investigation acted as an agent of the federal government when he examined appellant under this law relating to "the national welfare, safety and security" (Appendix, p. 1). Relevant information given the state in this loyalty-security area would undoubtedly be transmitted to the F.B.I. (see, e. g., *Commonwealth of Pennsylvania v. Nelson*, 350 U. S. 497, 506, 519, ftn. 10). Appellant's rights against the agent could not be less than those against the principal.

The situation here is analogous to that in *Gambino v. U. S.*, 275 U. S. 310, 319, where the "peculiar relation borne in New York . . . by state officers to federal prohibition enforcement" led to reversal of a federal conviction based upon evidence unlawfully seized by state officials.

Appellant's right to assert his constitutional privilege in an essentially federal proceeding with respect

to federal crime is a privilege of national citizenship. His dismissal abridged such privileges and immunities since they "arise out of the nature and essential character of the national government" (*Twining v. New Jersey*, 211 U. S. 78, 97).

This right to assert the federal constitutional privilege before a state agency of the federal government has never been the subject of consideration by this Court.* It raises important questions concerning federal-state relations in an area of expanding collaboration.

(4) The construction of the statute and State Constitution denies appellant the equal protection of the laws.

A. Article I, § 6 of the State Constitution provides that one shall not "be compelled in any criminal case to be a witness against himself." This section has been given a broad and liberal construction for many years in the court below in favor of the citizen. *In re Grae*, 282 N. Y. 428; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 227; *Matter of Doyle*, 257 N. Y. 244; *People v. Harris*, 294 N. Y. 424; *People v. Doyle*, 1 N. Y. 2d 732; *Matter of Kaffenburgh*, 188 N. Y. 49.

The State Constitution authorizes the sanction of discharge only against a grand jury witness refusing to "testify concerning the conduct of his office or the performance of his official duties" (Art. I, § 6); this exception is not applicable here.

The only persons in the State of New York punished under the decisions of the court below for invocation

* This issue must be distinguished from two related ones: (1) the right to assert the state constitutional privilege in a purely state proceeding because of the possibility of federal incrimination (see *Jack v. Kansas*, 199 U. S. 372); and (2) the extent to which the federal constitution protects the assertion of the state privilege where federal incrimination is not involved (see *Adamson v. California*, 332 U. S. 46).

of the privilege are those involved in these so-called security cases. This was first manifested in the state court's decision in *Daniman v. Board of Education*, 306 N. Y. 532, reversed in part, *sub. nom. Slochower v. Board of Education*, 350 U. S. 551. It is carried farther by the present decision which equates assertion of the privilege with evidence of guilt.

Discrimination against a particular class, whether by judicial interpretation of state statute or constitution, denies equal protection of the laws under the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U. S. 1, 14. The discrimination and classification is particularly unreasonable where it is directed against persons accused of political dissidence, the very group intended to be protected by the Fifth Amendment. *Quinn v. United States*, *supra*, p. 163, fn. 31. New York stands alone in its imputation of guilt. Florida has only recently decided otherwise. *Sheiner v. Florida*, 82 So. 2d 657, cited in *Konigsberg v. State Bar of California*, *supra*, p. 732, fn. 31.

B. The state court's decision presents two other substantial issues of equal protection: (1) It had previously held that state employees were entitled to a "fair trial", i.e., confrontation and cross-examination, *Matter of Fusco v. Moses*, 304 N. Y. 424, 434; *Matter of Greenbaum v. Bingham*, 201 N. Y. 343, 347; *People ex rel. Packwood v. Riley*, 232 N. Y. 283; (2) It had held that employees could not be discharged except upon "the charge litigated", *Matter of Meyer v. Goldwater*, 286 N. Y. 461, 463. The instant decision authorizing summary discharge upon grounds not charged is a radical departure from these standards, thus denying appellant equal protection of the laws.

Respectfully submitted,

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APPENDIX

The Statute

The Security Risk Law of New York, Chapter 233, Laws of 1951, as amended by Chapter 105, Laws of 1954, effective March 15, 1954, read as follows at the time of appellant's suspension and discharge:

"An Act to amend chapter two hundred thirty-three of the laws of nineteen hundred fifty-one, entitled 'An act declaring the existence of a public emergency and authorizing the disqualification of applicants and eligibles for entrance into public service, and the suspension and removal or transfer of officers and employees in the service of the state and its civil divisions, whose appointment or continued employment during the emergency is deemed dangerous to the national welfare, safety and security,' in relation to the adoption by the state civil service commission of designations of subversive organizations made by the United States attorney general or the state board of regents, and by extending its provisions to June thirtieth, nineteen hundred fifty-five."

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Declaration of legislative findings and intent. The legislature hereby finds and declares the existence of a serious public emergency in this state resulting from the following acts and events among others: the mandate of the United Nations to its armed forces, including those of the United States, to repel armed aggression against the government and the people of Korea south of the 38th Parallel; the proclamation by the president of the United States of America declaring the existence of a national emergency and calling for the intensive and con-

centrated mobilization and utilization of the resources and facilities of the nation and for the coordination and direction of state and local activities related to civilian protection and to state and national defense. The legislature also finds that the employment of members of subversive groups and organizations by government presents a grave peril to the national security. These groups and organizations are frequently well organized and rigidly disciplined, and often under the direction and control of a foreign power are dedicated to the task of bringing about the overthrow of existing legally constituted government by any available means, including force if necessary. If members of such organizations and groups and persons concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in public service in security positions would endanger the security or defense of the nation and the state, are permitted to hold public office and employment, their retention in security positions during the existence of a national emergency would imperil or endanger the safety, welfare or best interests of the armed forces, the civilian defense forces and the people of this state and of the United States. In view of this imminent and great danger to our national security, it is vital and essential that measures be taken to effect the disqualification for entrance into and the suspension and removal from security offices and positions in governmental service of persons concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in security positions would endanger the security or defense of the nation and the state. In consequence thereof, the necessity for the enactment of this act and for the operation and effectiveness of its provisions during the period of such emergency, beginning from the date this act takes effect and terminating on the thirtieth day of June, nineteen hundred fifty-two, are hereby declared as a matter of legislative determination.

§ 2. Definitions. (a) The term "security agency" as used in this act shall mean any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential information relating to the security or defense of the nation and the state may be available.

(b) The term "security position" as used in this act shall mean (1) any office or position in the public service which requires the performance of functions which are necessary to the security or defense of the nation and the state; or (2) any office or position in any public agency or department where confidential information relating to the security or defense of the nation and the state may be available.

§ 3. Determination of security agency and security position. Upon its own initiative or whenever requested by the head of any department, bureau, division or other agency of the state government, or by any municipal civil service commission, or board, or body, authorized by law to conduct examinations and certify eligibles for positions in the service of the state or its civil divisions, the state civil service commission shall determine whether or not (1) an agency is a security agency within the meaning of section two(a) of this act, or (2) a position is a security position within the meaning of section two(b) of this act. Such determination by the state civil service commission shall be subject to review by the courts in accordance with the provisions of article seventy-eight of the civil practice act.

§ 4. Disqualification of applicant or eligible. The state civil service commission and each municipal civil service commission or other board or body authorized by law to conduct an examination and certify an eligible for appointment to a security position in governmental service shall

refuse to examine an applicant for, or after examination, to certify an eligible to, such position if it finds, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such applicant or eligible would endanger the security or defense of the nation and the state.

§ 5. Suspension and removal or transfer. Any public officer, board, body or commission of the state or of any civil division thereof authorized by law, rule or regulation to exercise the power of appointment may, in his or its absolute discretion and when deemed necessary in the interests of national security, transfer, subject to the approval of the civil service commission having jurisdiction, to a position other than a security position or to an agency other than a security agency, or suspend without pay any officer or employee under his or its appointive jurisdiction occupying a security position or a position in a security agency, whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state. The officer or employee with respect to whom such action was taken shall be notified that such action was taken pursuant to this section and, to the extent possible without disclosing confidential sources of information of law enforcement agencies, or agencies empowered or required by law to investigate subversive activities or disloyalty, the reasons for such action. Within thirty days after such notification, such person shall have an opportunity to submit statements or affidavits to show why he should be reinstated or restored to duty. Following such further investigation and review as he or it shall deem necessary, the officer, board, body or commission taking such action shall affirm

the transfer or terminate the employment of such officer or employee if he or it shall find, that, upon all the evidence, reasonable grounds exist for the belief that, because of doubtful trust and reliability, the employment of such person in a security position or in a security agency would endanger the security or defense of the nation and the state. If the officer, board, body or commission finds no reason to warrant the transfer or removal of such officer or employee, he shall be restored to his position and if such officer or employee has been suspended from his position, he shall, upon restoration, be entitled to back pay for the period of his suspension.

§ 6. Appeal to state civil service commission. Any person who believes himself aggrieved by a determination of disqualification under the authority of section four of this act and any officer or employee who believes himself aggrieved by a determination of transfer or dismissal under the authority of section five of this act may appeal from such determination by an application in writing to the state civil service commission within twenty days after receiving written notice of such determination. Such commission shall set a time and place for the hearing of such appeal and give due notice thereof to the appellant and to the officer, board, body or commission whose determination is under review. The hearing shall be held by the commission or by a person or persons, not exceeding three, designated by the commission in writing to hear such appeal in its behalf. The Commission, in its discretion, may designate such person or persons to hear and determine said appeal or to hear and report to the commission and, in the latter event, the report shall be acted upon by the entire commission. The persons so designated by the commission may be officers or employees of the civil service of the state. They shall have the power to require amplification of the reasons for the action appealed from and to administer oaths, hold or conduct public or private hearings, subpoena and compel the attendance of witnesses, and the

production of books, papers, records and documents. The person or persons holding such hearing shall make such inquiry as may be deemed advisable, and shall upon the request of the appellant permit him to be represented by an attorney and to present evidence in his behalf. The Commission or the person or persons authorized to hear and determine such appeal may affirm, reverse or modify the findings and determination under review and, in the case of reversal, shall order the reinstatement of the appellant, and if such appellant had been dismissed from his position, he shall, upon restoration, be entitled to back pay from the date of his suspension. The commission may direct the transfer of an appellant to a similar position in another division or department other than a security position or a position in a security agency, or may direct that his name be placed upon a preferred list pursuant to section thirty-one of the civil service law for reinstatement to a position other than a security position or a position in a security agency. The decision of the commission or the person or persons designated by it to hear and determine such appeal shall be final and conclusive and shall not be subject to review in any court.

§ 7. Evidence. In proceedings taken pursuant to this act, evidence shall not be restricted by the rules of evidence and procedure prevailing in the courts. A finding, pursuant to sections four or five of this act, may be based upon evidence of the previous conduct of the applicant, eligible officer, or employee, as the case may be, which may include to the extent deemed appropriate, but shall not be limited to evidence of (a) previous unauthorized disclosure of confidential information; (b) the commission or attempt to commit an act or acts designed to or tending to undermine, sabotage, hamper or obstruct a program adopted by the agency or department by which he is employed or which affects the security or defense of the nation and the state; (c) treasonable or seditious conduct; and (d) membership

in any organization or group found by the state civil service commission to be subversive.

§ 8. Subversive groups and organizations. As used in this act, a subversive group or organization shall be one which is found by the state civil service commission, after inquiry, and after such notice and hearing as may be appropriate, to advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or to advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. The commission, in making such inquiry, may utilize any listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, or by the state board of regents, and for the purposes of such inquiry the commission may request and receive from said federal agencies or authorities or state board of regents, any supporting material or evidence that may be made available to it. Where any organization or group has been so designated by the United States attorney general pursuant to executive order number ten thousand four hundred fifty, of April twenty-seventh, nineteen hundred fifty-three or any executive orders or regulations amendatory or supplemental thereto, or by the state board of regents pursuant to section three thousand twenty-two of the education law, or any acts amendatory or supplemental thereto, the state civil service commission may adopt such designation for the purposes of this act, provided such designation by the United States attorney general or the state board of regents was made after due notice to such organization or group and an opportunity afforded it to answer.

§ 9. To the extent of appropriations available therefor, the civil service commission is authorized to enter into contract with the federal bureau of investigation, the United

States department of justice, or any other appropriate public agency for the supplying of information, in making investigations, or any other assistance necessary for the performance of its duties pursuant to this act.

§ 10. The provisions of this act shall be controlling notwithstanding the provisions of any other general, special or local law.

§ 11. The provisions of this act shall remain in effect until June thirtieth, nineteen hundred fifty-five.

§ 12. This act shall take effect immediately.

Since its original passage in 1951, the statute has been extended six times for additional one year periods. L. 1952, c. 46; L. 1953, c. 26; L. 1954, c. 105; L. 1955, c. 156; L. 1956, c. 310; L. 1957, c. 176. No changes were made in its text except for an amendment to § 6 in 1953 to permit representation by counsel. L. 1953, c. 26, and an amendment in 1954 adding the last sentence to § 8. L. 1954, c. 105.

Opinion of Court of Appeals

(Decided February 28, 1957.)

In the Matter of

MAX LERNER,

Appellant,

against

HUGH J. CASEY *et al.*, Constituting the NEW YORK CITY
TRANSIT AUTHORITY,

Respondents.

APPEAL from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 25, 1956, affirming, by a divided court, an order of the Supreme Court at Special Term (BENJAMIN BRENNER, J.), entered in Kings County, granting a motion by respondents to dismiss the petition, and dismissing the petition and the proceeding.

CONWAY, Ch. J. We are here concerned with the question of whether petitioner is entitled to an order reinstating him to the position of subway conductor in the New York City Transit System. He has been discharged from such position by the respondents, constituting the New York City Transit Authority, upon the ground that a reasonable basis exists for the belief that, because of his doubtful trust and reliability, his employment in the position of conductor endangers the security or defense of the nation and the State.

On September 14, 1954, pursuant to instructions received from his immediate superior, petitioner appeared at the office of the commissioner of investigation of the

City of New York for the purpose of answering questions in an investigation being conducted by the commissioner. After he was sworn, petitioner was asked whether he was then a member of the Communist party. He refused to answer upon the ground that to do so might tend to incriminate him and that, therefore, he was entitled to claim the privilege against self-incrimination afforded him under the Fifth Amendment to the United States Constitution.

After being advised of the provisions of the Security Risk Law (L. 1951, ch. 233, as amd.) and being given an opportunity to reconsider his refusal, he reappeared at the office of the Department of Investigation on September 21, 1954, at which time he requested additional time to engage counsel. On September 30, 1954 he appeared, accompanied by counsel who requested and was granted a further adjournment. On October 8, 1954 petitioner again appeared with counsel and once more refused to answer questions as to whether he was then or had been a member of the Communist party.

The foregoing facts were brought to the attention of the Transit Authority. Thereafter, on October 21, 1954, the Authority adopted a resolution suspending petitioner, without pay, effective at the close of business on October 22, 1954. The resolution was sent to the petitioner with a covering letter. Both the letter and the resolution recited the reasons for the action taken and both notified the petitioner that he had the opportunity, within 30 days after notification, to submit statements or affidavits to demonstrate why he should be reinstated or restored to duty.

By report dated November 22, 1954, the executive director and general manager notified the Authority that, during the 30-day period allowed him, neither petitioner, nor anyone on his behalf, had communicated with the Authority or the Department of Investigation of the City of New York, and that further investigation had revealed activities on the part of the petitioner which gave reasonable grounds for belief that he was not a good security risk. The Author-

ity then found, upon review, that, upon all the evidence, reasonable grounds existed for the belief that because of his doubtful trust and reliability, the employment of petitioner in the position of conductor endangered the security or defense of the nation and the State. Accordingly, the employment of petitioner was terminated at the close of business on November 24, 1954.

The Security Risk Law, under which petitioner was discharged, was adopted in 1951 and has been extended so that its terminal date now is June 30, 1957 (L. 1956, ch. 310), unless extended again.

It will be helpful if we here summarize the various sections of the Security Risk Law.

The first section—section 1—is the declaration of the Legislature's findings and intent. It states, in part, that the Legislature " . . . finds that the employment of members of subversive groups and organizations by government presents a grave peril to the national security. These groups and organizations are frequently well organized and rigidly disciplined, and often under the direction and control of a foreign power are dedicated to the task of bringing about the overthrow of existing legally constituted government by any available means, including force if necessary. If members of such organizations " . . . concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in public service in security positions would endanger the security or defense of the nation and the state, are permitted to hold public office and employment, their retention in security positions during the existence of a national emergency would imperil or endanger the safety, welfare or best interests of the armed forces, the civilian defense forces and the people of this state and of the United States. . . . "

Section 5 provides for the suspension and removal or transfer of an employee under the statute. The provision conferring this authority is as follows: "Any public officer,

board, body or commission of the state or of any civil division thereof authorized by law, rule or regulation to exercise the power of appointment may, in his or its absolute discretion and when deemed necessary in the interests of national security, transfer, subject to the approval of the civil service commission having jurisdiction, to a position other than a security position or to an agency other than a security agency, or suspend without pay any officer or employee under his or its appointive jurisdiction occupying a security position or a position in a security agency, whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state."

Section 4 contains the provisions as to disqualification of applicants or eligibles.

The balance of the suspension and dismissal section (§ 5) contains the provisions for notification to the employee of the action taken and of the steps he may then take. They are as follows: "The officer or employee with respect to whom such action was taken shall be notified that such action was taken pursuant to this section and, to the extent possible without disclosing confidential sources of information of law enforcement agencies, or agencies empowered or required by law to investigate subversive activities or disloyalty, the reasons for such action. Within thirty days after such notification, such person shall have an opportunity to submit statements or affidavits to show why he should be reinstated or restored to duty. Following such further investigation and review as he or it shall deem necessary, the officer, board, body or commission taking such action shall affirm the transfer or terminate the employment of such officer or employee if he or it shall find, that, upon all the evidence, reasonable grounds exist for the belief that, because of doubtful trust and reliability, the

employment of such person in a security position or in a security agency would endanger the security or defense of the nation and the state. If the officer, board, body or commission finds no reason to warrant the transfer or removal of such officer or employee, he shall be restored to his position and if such officer or employee has been suspended from his position, he shall, upon restoration, be entitled to back pay for the period of his suspension."

Section 6 provides for appeal to the State Civil Service Commission by any person who believes himself aggrieved by a determination under sections 4 or 5, and the proceedings to be had upon such appeal.

Section 7 deals with evidence which may be considered in proceedings under the act. It declares that finding of disqualification (under § 4) and a determination of suspension, removal or transfer from the position (under § 5) may be based upon evidence of previous conduct, which may include "to the extent deemed appropriate, but shall not be limited to evidence of" four forms of conduct. One of these is "membership in any organization or group found by the state civil service commission to be subversive."

Section 8 provides that a subversive group or organization, as used in the law, shall be one found by the State Civil Service Commission, after inquiry and appropriate notice and hearing, to advocate the overthrow of the government by force and violence, or so designated by the United States Attorney General or by the State Board of Regents pursuant to the Feinberg Law (Education Law, § 3022), provided these designations were made upon notice to the organization or group and opportunity afforded to answer.

Section 2 defines "security agency" as meaning: "... any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential information relating to the security or defense of the nation and the state may be available."

The section defines "security position" as: " * * * (1) any office or position in the public service which requires the performance of functions which are necessary to the security or defense of the nation and the state; or (2) any office or position in any public agency or department where confidential information relating to the security or defense of the nation and the state may be available."

Section 3 provides how it shall be determined what is a security agency or security position: "Upon its own initiative or whenever requested by the head of any department, bureau, division or other agency of the state government, or by any municipal civil service commission, or board, or body, authorized by law to conduct examinations and certify eligibles for positions in the service of the state or its civil divisions, the state civil service commission shall determine whether or not (1) an agency is a security agency within the meaning of section two (a) of this act, or (2) a position is a security position within the meaning of section two (b) of this act. Such determination by the state civil service commission shall be subject to review by the courts in accordance with the provisions of article seventy-eight of the civil practice act."

On November 23, 1953 the State Civil Service Commission declared the New York City Transit Authority to be a security agency within the meaning of the Security Risk Law. On March 24, 1954 by resolution the commission listed the Communist party of the United States and of the State of New York as subversive within the meaning of the Security Risk Law. This was based upon and was an adoption of such listing of the Communist party by the State Board of Regents under the Feinberg Law.

The facts as to petitioner's discharge under the Security Risk Law have been set forth above.

On this app the following basic questions are presented:

(1) Whether the New York City Transit Authority is a "board, body or commission of the state or of any civil

division thereof" within the intendment of the Security Risk Law and whether the city commission of investigation had jurisdiction to conduct the inquiry;

(2) Assuming that the answer to (1) be in the affirmative, whether the Transit Authority was properly designated a "security agency";

(3) Assuming that the answer to (2) be also in the affirmative, whether the Security Risk Law authorizes the Transit Authority to suspend and discharge one occupying the position of subway conductor in such security agency merely upon a showing that, when asked if he was *then* a member of the Communist party, he refused to answer, and then gave as a reason for so refusing, that to answer might tend to incriminate him within the meaning of the Constitution, and

(4) Assuming that the answer to (3) be also in the affirmative, whether the Security Risk Law is constitutional.

We shall treat of the questions seriatim.

The New York City Transit Authority was created by the Legislature as a "body corporate and politic constituting a public benefit corporation". (Public Authorities Law, § 1801, subd. 1.) It operates the transit facilities owned by the City of New York. It is comprised of three members, one of whom is appointed by the Mayor of the City of New York, one by the Governor of the State and the third member (who shall be chairman of the board) appointed by the first two members after their appointment and qualification. Neither the chairman nor any member shall hold any other paid public office or employment under the Government of the United States, of the State of New York or of the City of New York. The Authority performs the vital function previously vested in the Board of Transportation of the City of New York, which was a city agency and eligible to be declared a security agency.

It is clear that the danger to government to be anticipated from the activities of a subversive individual in the employ of the Transit Authority is no different from the danger to government to be anticipated from such individual if he were still in the employ of its predecessor body, the Board of Transportation. We think it also clear that the purpose of the Legislature in enacting the Security Risk Law was to protect the government and those public authorities performing vital functions of government from the peril of infiltration of subversive individuals into the public service. Accordingly, in our judgment, the Transit Authority is a "board, body or commission of the state or of any civil division thereof" within the intendment of the Security Risk Law.

The petitioner argues that the city's interest in the transit system is that of lessor of the physical properties only, and that such interest does not justify its interrogation of employees of the Transit Authority. We do not agree.

The City of New York is empowered, through the commissioner of investigation, to investigate and inquire into all matters of concern to the city or its inhabitants (see General City Law, § 20, subd. 21; § 23, subd. 1; New York City Charter, § 803). As we have said, the City of New York owns the rapid transit facilities which constitute the New York City Transit System. In June of 1953 those facilities were leased by the city to the Transit Authority for a period of 10 years. Under the lease the city is required to pay the costs of the capital improvements on the transit system and, so, the city has a proprietary interest in preserving and protecting those facilities from sabotage or destruction. Moreover, it cannot be doubted that the very existence of the city is dependent upon the safe and uninterrupted operation of the transit system. Certainly, an investigation to determine whether employees of the transit system are members of subversive organizations or are of doubtful trust and reliability is "in the

best interests of the city" (New York City Charter § 803, subd. 2). That being so, the investigation here involved was properly initiated by the commissioner of investigation (see *Matter of Cherkis v. Impellitteri*, 307 N. Y. 132, 148).

The Public Authorities Law confers upon the Transit Authority the right to avail itself of the services of the officers and agencies of the city government (see Public Authorities Law, § 1803, subd. 3, par. b). The Authority must be said to have exercised its right to make use of the services of the commissioner of investigation and, in effect, to have authorized said commissioner to conduct the investigation on its behalf, when it directed the petitioner to appear before the commissioner to answer questions designed to ascertain whether he was of doubtful trust and reliability. Under the Security Risk Law the Authority is not required to make its determination upon evidence developed as a result of its own investigation—it has the right to consider and weigh evidence from any source.

We turn now to the question of whether the Transit Authority was properly designated a "security agency."

The law defines the term "security agency" as follows: "(a) The term 'security agency' as used in this act shall mean any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential information relating to the security or defense of the nation and the state may be available."

The Transit Authority performs a function necessary to the security or defense of the nation and the state. This fact was vividly demonstrated recently when certain New York City subway motormen went out on strike. Mr. Justice LUPIANO, Special Term, New York County, in issuing an injunction against those motormen, aptly pointed out (*New York City Tr. Auth. v. Loos*, 2 Misc 2d 733, 738):

"It is easy to forget, while the subways are running, that there is room for motor vehicles on the streets only because millions travel by subway; for if all persons had to use surface transportation, the bridges and tunnels and main highways would soon be hopelessly clogged. New York with its immense territory and its five separate boroughs, all protected by unified police and fire departments and having many other integrated services, is dependent for its very life and daily functioning, and for the immediate safety of its 8,000,000 inhabitants, on rapid transit facilities which are necessarily used by nearly all persons engaged in all of its governmental and other vital functions. Whatever may be the case elsewhere, and under other conditions, whatever may have been the case in other times, here and now, and for this city, the operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare. It is worth re-emphasizing that the subways are the city's arteries upon which its life and daily living depend. * * *"

We consider it clear, therefore, that the Transit Authority has been properly denominated a "security agency".

The Appellate Division, in concluding that the petitioner's refusal to answer the question posed constituted sufficient justification for his dismissal under the Security Risk Law, wrote:

"We apprehend that if a statute, such as the Los Angeles ordinance * permitting discharge of a public em-

* In *Garner v. Los Angeles Bd.* (341 U. S. 716), the Supreme Court of the United States upheld an ordinance of the City of Los Angeles which required every employee to execute an affidavit, stating whether or not he was or ever had been a member of the Communist party or the Communist Political Association. Mr. Justice Clark, writing for the court, said (p. 720):

"The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us

ployee for refusal to execute an affidavit of the character there required, is valid and justifies his discharge for that reason, it is proper for a security agency, charged with the duty of determining whether an employee is of doubtful trust and reliability from a security standpoint, to inquire into those matters and, if the employee refuses to answer, it may not be said that the agency is not empowered to find that such refusal, in and of itself, furnishes reasonable grounds for a belief that he is not a good security risk. It is our view that the correct construction has been placed on the Security Risk Law by the Transit Authority and by the Special Term."

Petitioner contends that the Legislature in enacting the Security Risk Law intended that a security risk agency must have a hearing at which it introduces evidence against the employee before it may find the employee to be a security risk and that it may not discharge the employee for mere failure to answer the question as to Communist party membership. The respondents, on the other hand, contend that the refusal to reply to the crucial question as to Communist party membership is "evidence" of "doubtful trust and reliability", which is the ground for discharge under the Security Risk Law. They point out that the petitioner was not discharged on the ground that he was a Communist party member. He was discharged

is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

This reasoning, it seems to us, is determinative of the case presently before us.

for having created a doubt by declining to answer whether he was or was not a member.

We agree with the respondents.

It seems to us that it would be more clear if we suppositiously divided the conduct of petitioner into two parts. The first, when he was asked by his employer whether he was then a member of the Communist party. That question he refused to answer. He then left the room. Certainly by that conduct he would have given evidence of his own untrustworthiness and unreliability. Suppose then, as the second part of his conduct, he returned five minutes later and told the commissioner of investigation that he had refused to answer his question because to do so might tend to incriminate him. May not the employer discharge an employee who refuses to answer his proper question? If the petitioner, in the case supposed, had not returned to the commissioner five minutes later and given a reason for his conduct, we think all would agree that he was properly discharged. Does it change the situation because he returns to say that he refused to answer because to do so might tend to incriminate him? Does that explanation destroy the evidence which he has given to his employer of his untrustworthiness and unreliability as a security risk? Does the explanation *require* that the employer consider without any doubt that the employee by his explanation has again become trustworthy and reliable as a security risk as a matter of law? We think not.

The intent of the Security Risk Law was to set up a removal procedure which would provide a more ready means of removing security risks from public service than sections 22 or 12-a of the Civil Service Law. This is apparent from the fact that even under the Civil Service Law an employee, refusing to answer questions put to him by his employer pertaining to his official conduct, may be removed, after a hearing, under a charge of insubordination without any showing by the employer of the information which prompted the inquiry.

The contentions of the petitioner (1) that the Security Risk Law is unconstitutional because an emergency no longer existed in 1954 when the petitioner was dismissed since the Korean War had ended and (2) no emergency could conceivably justify the dismissal of the petitioner because his position as a conductor could have no rational connection with national security, are untenable.

As to (1) all that need be said is that the wisdom of the Legislature in extending the Security Risk Law beyond the period of the Korean War has been confirmed by world events transpiring since the Korean Truce.

As to (2) we are in accord with respondents that the importance of the petitioner's position to the security of the State and of the City of New York can be readily seen when it is considered that in modern warfare the civilian population may well be a prime target. A bombing raid on New York City would undoubtedly be planned for a time when the maximum number of people would be in the city. The most important facility for the evacuation of the people would be the subway system. If the petitioner were a member of the Communist conspiracy he would, as an employee of the transit system in charge of a train, as conductors are, be a very real threat to the security of the State and of the city.

It may be argued that one conductor can do very little harm. The answer to that argument, however, is to be found in the words of Mr. Justice Jackson in his concurring opinion in *Dennis v. United States* (341 U. S. 494, 564): "The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in transportation, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members. It also seeks

to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion." (Emphasis supplied.)

The final question pertains to the constitutionality of the Security Risk Law, as thus construed and applied to petitioner.

The petitioner contends that the case of *Slochower v. Board of Educ.* (350 U. S. 551) is controlling authority for the proposition that the Security Risk Law, as so construed, is unconstitutional.

In distinguishing the *Slochower* case the majority of the Appellate Division concluded that the holding there was merely that a teacher in a city college, entitled to tenure, and who could be discharged only for cause and after notice, hearing, and appeal, could not be mandatorily and summarily dismissed solely on the ground that he invoked the protection of the Fifth Amendment before a Congressional committee conducting an inquiry not directed at the property, affairs, or government of the city or the official conduct of city employees. In further distinguishing the *Slochower* case, the Appellate Division said, in part: "• • • We apprehend that in view of the manner in which the court stressed the 'remoteness' of the period to which they [the questions] are directed,' the failure of the statute to provide an opportunity to explain the reason for refusal to answer and, more particularly, the nature of the inquiry being conducted by the Federal committee, that decision must be strictly limited to its own peculiar facts. The reference to the *Garner* case is some indication that, had Professor Slochower's refusal to answer occurred before a duly constituted body investigating the affairs of the board of higher education or of Brooklyn College, a different result would have been reached even under section 903 of the charter."

We believe that the Appellate Division has properly distinguished the *Slochower* case (*supra*) from the present case. In that case the majority of the Supreme Court said (350 U. S. 551, 558):

"As interpreted and applied by the state courts, it [New York City Charter, § 903] operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of *Wieman v. Updegraff*, *supra*.

"It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or . . . official conduct of city employees.' In this respect the present case differs materially from *Garner*, where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information."

Here, the city was conducting an investigation to determine whether any employees of the Transit Authority were of doubtful trust and reliability; such investigation was

properly instituted in the best interests of the city; the question asked was not remote, it was as to petitioner's *then* membership in the Communist party—a continuing conspiracy against our form of government; no inference of membership in that party was drawn from petitioner's refusal to reply to the question asked and, finally, the petitioner was given an opportunity to explain why he had chosen not to answer the question. Petitioner was not discharged for invoking the Fifth Amendment; he was discharged for creating a doubt as to his trustworthiness and reliability by refusing to answer the question as to Communist party membership.

In the *Slochower* case it was the plea of the Fifth Amendment, *and that alone*, causing automatic dismissal which the Supreme Court condemned. The Security Risk Law does not so operate. When the employee refuses to tell his employer whether he is a member of the Communist party, surely he is giving evidence of "reasonable grounds" for doubt as to whether, as Mr. Justice BRENNER said in the Special Term opinion, he "might be" a member; he is giving "reasonable grounds" for "doubt" about his trustworthiness and reliability as a security risk. If, in refusing, the employee injects his claim of privilege under the Fifth Amendment, that circumstance is incidental or additional. The dismissal is still proper for refusing that vital, fundamental information. Were that not so, this would be the result: An employee may be dismissed for refusing to give information as to whether or not he is a Communist party member (*Garner v. Los Angeles Bd., supra*), but if with his refusal he draws into or adds to his words of refusal a claim that to answer might tend to incriminate him and he, therefore, claims the privilege to refuse to answer under the Fifth Amendment to the United States Constitution, he may not be dismissed. That cannot be.

The petitioner also argues that he asserted his constitutional privilege with respect to a Federal crime and as a part of his national citizenship so that his dismissal abridged his privileges and immunities as a citizen of the United States. It seems to me that such an argument is untenable in a situation such as this where the employee uses the privilege to thwart his employer in ascertaining whether or not he is a member of a criminal conspiracy. In the *Slochower* case (*supra*), as we have pointed out, the Supreme Court indicated that when the questions are asked by the city the employee has an obligation to answer.

The order of the Appellate Division should be affirmed, with costs.

FULD, J. (dissenting). While I am not unmindful of the public interest to be served by ridding government of the subversive and the security risk, I cannot join in the court's decision, for, in my view, the appellant's discharge from his job of subway conductor was effected in disregard of the applicable statute and in violation of constitutional right.

The Security Risk Law was enacted in 1951, as a temporary emergency measure (L. 1951, ch. 233), in response to the Communist aggression in Korea the year before (§ 1). In substance, it authorizes "Any public officer, board, body or commission of the state or of any civil division thereof" to discharge or suspend "any officer or employee under his or its appointive jurisdiction occupying a security position or a position in a security agency, whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or

defense of the nation and the state" (§ 5).¹ A "security agency" is defined as any agency or unit of government where "functions are performed which are necessary to the security or defense of the nation and the state" or where "confidential information relating to the security or defense of the nation and the state may be available." A "security position" is a post in the public service "which requires the performance of functions which are necessary to the security or defense of the nation and the state" or one in any public agency or department "where confidential information relating to the security or defense of the nation and the state may be available" (§ 2). To the State Civil Service Commission is delegated the authority of determining whether an agency is a security agency or whether a job is a security position within the meaning of the statute (§ 3).

It is open to grave doubt that the New York City Transit Authority, set up as a "body corporate and politic constituting a public benefit corporation" (Public Authorities Law, § 1801, subd. 1), may be regarded as an agency "of the state or of any civil division thereof" within the ambit of the act before us (Security Risk Law, § 5). It is likewise dubious that the Transit Authority may correctly be labeled a "security agency" within the statute's definition (§ 2, subd. [a]). However, I put these troublesome doubts to one side, since I am thoroughly persuaded that, in any

¹ Another provision recites that the finding required by section 5 "may be based upon *evidence* of the previous conduct of the . . . officer, or employee . . . which may include to the extent deemed appropriate, but shall not be limited to *evidence* of (a) previous unauthorized disclosure of confidential information; (b) the commission or attempt to commit an act or acts designed to or tending to undermine, sabotage, hamper or obstruct a program adopted by the agency or department by which he is employed or which affects the security or defense of the nation and the state; (c) treasonable or seditious conduct; and (d) membership in any organization or group found by the state civil service commission to be subversive" (§ 7, emphasis supplied).

event, the Security Risk Law may not be stretched, under the circumstances of this case, to reach the appellant whose duties are to open and close the doors of subway trains.

Parlous though the times, the anticipation of risks to "the security or defense of the nation and the state" (§ 5) from a person in the appellant's position strikes me as a submission to unreasoning fear rather than a rational basis for administrative action. (Cf. *Cole v. Young*, 351 U. S. 536; *Matter of Pinggera v. Municipal Civil Service Comm.*, 206 Misc. 615.) The job of opening and closing the doors of a subway train is hardly one of the "strategic posts in transportation" to which Mr. Justice Jackson adverted in *Dennis v. United States*, 341 U. S. 494, 564 (see opinion of CONWAY, Ch. J., *ante*, p. 370). Of course, all men possess a capacity to do injury, but, to pose a risk to security or defense, one's potential for harm must be greater, more distinctive, than this appellant's; no less danger or risk is to be anticipated from any one of the millions of persons who periodically ride the subways as passengers.²

However, even if the statute were to be held to apply to the appellant, his dismissal cannot be sustained without violating his right to due process of law under both state

² It should, of course, be noted that in appellant's case the statute's careful definition and examples of a "security position" have been entirely ignored. It is argued that they are irrelevant because the State Civil Service Commission has denominated the Authority a "security agency", thereby converting its every post into a "security position", but I find no justification in the statute for such action. (Cf. *Cole v. Young*, *supra*, 351 U. S. 536.)

Indeed, the record tells us nothing of the steps taken by the commission in reaching its determination. Moreover, we are left completely in the dark as to whether the appellant or others affected were notified that the matter was under consideration, or even that the determination had been made. (Security Risk Law, §§ 2, 3; cf. *Anti-Fascist Comm. v. McGrath*, 341 U. S. 423, 465 *et seq.*, per Frankfurter, J., concurring.) We are not even told where the determination of the commission is to be found or whether any opportunity was afforded for the prescribed judicial review (§§ 3, 4; cf. *Adler v. Board of Educ.*, 342 U. S. 485, 490).

and federal constitutions (N. Y. Const., art. 1, § 6; U. S. Const., 14th Amdt.).³

The statute, as noted, requires a finding based "upon * * * evidence" that, "because of doubtful trust and reliability, the employment of [the] person * * * [in question] would endanger the security or defense of the nation and the state" (§ 5). The only "evidence" in support of the Transit Authority's finding "of [appellant's] doubtful trust and reliability" consisted of his refusal, on the basis of the constitutional privilege against self-incrimination, to answer questions put to him by the city commissioner of investigation relating to membership in the Communist party. Apart from his constitutionally protected silence, there was not the slightest evidence or predicate in the record for any inference that he was a member of that organization, that he was of doubtful trust or reliability or that his continued employment would prove dangerous to state or nation.

It is important at the outset* to observe that we have here no question whether the state could with propriety, by a clearly worded statute, impose an absolute duty upon public officers or employees to answer questions relating to their official conduct as a condition of continued employment. (See New York City Charter, § 903; N. Y. Const., art. 1, § 6; cf. *Garner v. Los Angeles Bd.*, 341 U. S. 716.) The statute before us, essentially different, imposes no such condition. Instead, it authorizes dismissal only upon "evidence" that the particular officer or employee is of such "doubtful trust and reliability" as to endanger the "security" or "defense" of the nation and the state. The narrow issue here presented, therefore, is whether the appellant's exercise of his constitutional right

³ In the view thus taken, I have no occasion to consider the appellant's further reliance upon the privileges and immunities clause of the Fourteenth Amendment—though I am inclined to agree with the court's conclusion that that clause is not here applicable. (Cf. *Adamson v. California*, 332 U. S. 46; *Slochower v. Board of Educ.*, 350 U. S. 551, 555.)

to remain mute may serve as the basis for inferring the existence of the facts prescribed by the statute as a condition of discharge.

Slochower v. Board of Educ. (350 U. S. 551), though concerned with a different statute and a somewhat different situation, seems to me decisive that such an inference may not be drawn from the mere assertion of the privilege. The Supreme Court there held, and in unmistakable terms announced, that an imputation of guilt from the claim of privilege would constitute "arbitrary action" violative of the "very essence of due process" (p. 559).

Firmly established as "one of the great landmarks in man's struggle to make himself civilized" (Griswold, *The Fifth Amendment Today* [1955], p. 7), the privilege against self-incrimination stands as a bulwark for the protection of persons accused, as well as of witnesses, who, though entirely innocent of any wrongdoing, may have a reasonable and honest fear of prosecution. Recognition of this fundamental right demands that it be freely exercisable without undue restraint or invidious consequences. As the Supreme Court declared in *Slochower* (350 U. S., at p. 557):

"At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' *Brown v. Walker*, 161 U. S. 591, 610. We have reaffirmed our faith in this principle recently in *Quinn v. United States*, 349 U. S. 155. In *Ullmann v. United States*, 350 U. S. 422, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."

It is urged that the *Slochower* decision is not in point, since the Supreme Court itself there noted that the case involved the assertion of the privilege in an investigation conducted by a "federal committee" rather than by "city authorities" (p. 558). That observation, however, in no way operated to lessen the force either of the Supreme Court's sweeping condemnation of "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment", or of the court's solemn affirmation that that right "would be reduced to a hollow mockery if its exercise" could be twisted into a confession of guilt or disloyalty.

Yet that is precisely the vice of what was done in this case. It is contended that a public officer or employee, unlike the general citizenry, may properly be found to be at least "of doubtful trust and reliability," if not actually disloyal, where he claims his right to refuse to answer questions relating to his possible association with a subversive organization. Whether, however, the refusal be taken as an admission of his membership in such organization, or merely as engendering a doubt as to his reliability, the fact remains that in either instance an adverse, "sinister" inference, fraught with serious consequences, is attempted to be drawn from the invocation of the constitutional privilege. Based as it was solely upon his exercise of the privilege, the appellant's discharge constitutes "arbitrary action" within *Slochower*, regardless of the formal difference in the labels employed. Any other conclusion would be strange indeed: to treat reliance upon a fundamental constitutional guarantee as proof of "untrustworthiness and unreliability" is anomalous, a veritable contradiction in terms.

The point is made that appellant should have availed himself of the opportunity afforded by the statute of submitting statements or affidavits "to show why he should be reinstated or restored to duty" (Security Risk Law, § 5). As I read the record before us, the "opportunity" was

illusory, a Hobson's choice. His alternatives were either to repeat his reliance upon the constitution or to forego that right, to reassert his privilege or to capitulate and answer the question. His failure to make the choice is, consequently, irrelevant.

There is ever a need to achieve a balance between government security and the traditional rights of the individual. That balance has been destroyed by the way in which the statute before us has been applied. It is a delusion to think that the nation's security is advanced by the sacrifice of the individual's basic liberties. The fears and doubts of the moment may loom large, but we lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees. "Historic liberties and privileges," this court declared some twenty-five years ago (*Matter of Doyle*, 257 N. Y. 244, 268), "are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' (HOLMES, J., in *Northern Securities Co. v. United States*, 193 U. S. 197, 400), are not to change their form and content in response to the 'hydraulic pressure' (HOLMES, J., *supra*) exerted by great causes."

I would reverse the orders of the courts below.

VAN VOORHIS, J. (concurring in part with FULD, J.). In my view this was a "sensitive" employment, but petitioner was discharged upon the sole ground specified in the Security Risk Law, viz., that he was a bad security risk; in the legislative language, that his retention in this position "would endanger the security or defense of the nation and the state" (L. 1951, ch. 233, § 5, as extended). He was not charged with insubordination in refusing to answer questions relating to matters that might affect his qualifications for his work by reason of past or present affiliations. He was discharged upon an affirmative finding of fact that he was a bad security risk, of which there

was no evidence except that he had invoked the Fifth Amendment. I concur in the part of Judge FULB's opinion in which he reasons that invoking the Fifth Amendment does not have probative force to establish that petitioner has engaged in subversive conduct or to establish that in his position of employment he "would endanger the security or defense of the nation and the state", and that using it as evidence thereof constitutes a denial of due process of law.

For these reasons, in my judgment, the order appealed from should be reversed.

· DESMOND, DYE, FROESSEL and BURKE, JJ., concur with CONWAY, Ch. J.; FULB, J., dissents in an opinion in which VAN VOORHIS, J., concurs, in part, in a separate memorandum.

Order affirmed.

Order Appealed From

In the Matter of the Application of MAX LERNER,
Appellant,
For an order, etc.,

vs.

HUGH J. CASEY & others, constituting the New York City
Transit Authority,
Respondents:

BE IT REMEMBERED, That on the 18th day of October, in the year of our Lord one thousand nine hundred and fifty-six, Max Lerner, the appellant—in this cause, came here unto the Court of Appeals, by Leonard B. Boudin, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And Hugh J. Casey, & ors., constituting the New York City Transit Authority, the respondents in said cause, afterwards appeared in said Court of Appeals by Daniel T. Scannell, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Leonard B. Boudin, of counsel for the appellant—, and by Mr. Daniel T. Scannell, of counsel for the respondents, and by Miss Ruth Kessler Toch, of counsel for the Attorney General of the State of New York, pursuant to Section 71 of the Executive Law, brief

filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

(s) **RAYMOND J. CANNON,**
Clerk of the Court of Appeals of
the State of New York.

Court of Appeals, Clerk's Office,
Albany, February 28, 1957.

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JAN 25 1958

JOHN T. PEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 165

MAX LERNER,

Appellant,

vs.

**HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J.
KLEIN, HENRY K. NORTON, and DOUGLAS M.
MOFFAT, constituting the New York City Transit
Authority,**

Appellees.

BRIEF FOR THE APPELLANT

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INDEX

SUBJECT INDEX

BRIEF FOR THE APPELLANT

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	4
Statement	4
Summary of Argument	8
Argument	10
Point I—This Court has jurisdiction of the appeal	10
Point II—Appellant's discharge, where the sole alleged evidence of his unreliability was the assertion of his constitutional privi- lege, denied him due process of law under the Fourteenth Amendment	12
Point III—The Statute as written and applied violates procedural due process	17
A. The discharge for undisclosed activities	17
B. The Statutory deficiencies	18
Point IV—The Statute's proscription of mem- bership in so-called "subversive" organiza- tions violates freedom of speech, belief, assembly and association under the Four- teenth Amendment	20
A. Freedom of association	20
B. Appellant's innocuous work	22
C. The Statutory disregard of other as- pects of substantive due process	24

	Page
Point V—The Statute impaired appellant's constitutional privilege against self-incrimination under the Fifth Amendment and his privileges and immunities under the Fourteenth	25
Point VI—The denial to appellant of his State privilege against self-incrimination denied him due process and the equal protection of the laws under the Fourteenth Amendment	27
Conclusion	30
Appendix A	31
Appendix B	42

CITATIONS

CASES:

<i>Adamson v. Calif.</i> , 332 U.S. 46	27
<i>Adler v. Board of Education</i> , 342 U.S. 485	18, 19, 23, 24-25
<i>American Communications Association v. Douds</i> , 339 U.S. 382	20-21
<i>Anti-Fascist Committee v. McGrath</i> , 341 U.S. 123	23
<i>Block v. Hirsch</i> , 256 U.S. 135	21
<i>Board of Public Education, School District of Phila. v. Beilan</i> , 353 U.S. 964	11, 15, 16
<i>Braden v. Commonwealth of Kentucky</i> , 291 S.W. 2d 843 (Ky.)	26
<i>Brunner v. U. S.</i> , 343 U.S. 918	15
<i>Carter, In re</i> , 192 F.2d 15, cert. den., 342 U.S. 862	13
<i>Chastleton Corp. v. Sinclair</i> , 264 U.S. 543	21
<i>Cole v. Arkansas</i> , 333 U.S. 196	18
<i>Cole v. Young</i> , 351 U.S. 536	5, 22
<i>Commonwealth of Pennsylvania v. Nelson</i> , 350 U.S. 498	26, 27
<i>Daniman v. Board of Education</i> , 306 N.Y. 532	29
<i>DeJonge v. Oregon</i> , 299 U.S. 353	20
<i>Doyle, Matter of</i> , 257 N.Y. 244	28

INDEX

iii

Page

<i>Ellis, Matter of</i> , 258 App. Div. 558 (dissenting opinion), reversed, 282 N.Y. 435	28
<i>Emspak v. U. S.</i> , 349 U.S. 190	15
<i>Gambino v. U. S.</i> , 275 U.S. 310	26
<i>Garner v. Los Angeles Board</i> , 341 U.S. 716	11, 15, 16
<i>Goldsmith v. U. S. Board of Tax Appeals</i> , 270 U.S. 117	17
<i>Grace, In re</i> , 282 N.Y. 428	28
<i>Grunewald v. U. S.</i> , 353 U.S. 391	14
<i>Hamilton v. Regents of the University of California</i> , 293 U.S. 245	10
<i>Herndon v. Lowry</i> , 301 U.S. 242	21
<i>Home Building & Loan Association v. Blaisdell</i> , 290 U.S. 398	21
<i>Hughes v. Board of Higher Education of the City of N. Y.</i> , 309 N.Y. 319	5, 18
<i>Johnson v. U. S.</i> , 318 U.S. 189	14
<i>Kaffenburgh, Matter of</i> , 188 N.Y. 49	28
<i>Konigsberg v. The State Bar of California</i> , 353 U.S. 252	11, 13, 14, 15, 17, 20, 29
<i>McCollum v. Board of Education</i> , 333 U.S. 203	10
<i>Meyer v. Goldwater</i> , 286 N.Y. 461	18
<i>Morgan v. U. S.</i> , 304 U.S. 1	17
<i>Oliver, In re</i> , 333 U.S. 257	17
<i>Parker v. Lester</i> , 235 Fed. 2d 787	18
<i>People v. Doyle</i> , 1 N.Y.2d 732	28
<i>People v. Harris</i> , 294 N.Y. 424	28
<i>People ex rel. Taylor v. Forbes</i> , 143 N.Y. 219	28
<i>Perrin v. U. S.</i> , 232 U.S. 478	21
<i>Quinn v. U. S.</i> , 349 U.S. 155	14, 29
<i>Rogers v. U. S.</i> , 346 U.S. 374	16
<i>St. Joseph Stock Yards Co. v. U. S.</i> , 298 U.S. 38	17
<i>Schware v. Board of Bar Examiners of the State of New Mexico</i> , 353 U.S. 232	20
<i>Sheiner v. Florida</i> , 82 So.2d 657	29
<i>Shelley v. Kraemer</i> , 334 U.S. 1	29
<i>Stochower v. Board of Higher Education</i> , 350 U.S. 551, rehearing denied 351 U.S. 944	7, 11, 14, 15, 26, 27, 29
<i>Spector v. U. S.</i> , 247 F.2d 1002 (C.A. 9)	14

	Page
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234	11, 16
<i>Tot v. U. S.</i> , 319 U.S. 465	14
<i>Travis v. U. S.</i> , 247 F.2d 130 (C.A. 10)	14
<i>Twining v. New Jersey</i> , 211 U.S. 78, 97	27
<i>Ullmann v. U. S.</i> , 350 U.S. 422	14
<i>U. S. ex rel. Belfrage v. Shaughnessy</i> , 212 F.2d 128	14
<i>Uphaus v. Wyman</i> , 355 U.S. 16	11
<i>Watkins v. U. S.</i> , 354 U.S. 178	11, 16
<i>Wieman v. Updegraff</i> , 344 U.S. 183	10-11, 20, 24

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

CONSTITUTION OF THE UNITED STATES

First Amendment	4, 20
Fifth Amendment	2, 4, 8, 10, 12, 14, 25, 29
Ninth Amendment	2, 4
Tenth Amendment	2, 4
Fourteenth Amendment	2, 4, 8, 9, 10, 12, 20, 24, 25, 29

FEDERAL STATUTES

5 USCA 22-1	22
28 USCA 1257(2)	1, 8, 10, 11

CONSTITUTION OF THE STATE OF NEW YORK

Article I, Section 6	3, 4, 10, 12, 27
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NEW YORK STATUTES

Security Risk Law, L. 1951, c. 233, as amended L. 1954, c. 105	4, 5, 7, 8, 15, 20, 21, 23, 25
Civil Service Law, Section 12-a	4, 18, 19
Section 22	4
Public Authorities Law, Section 1800 et seq. (now Section 1200 et seq.)	4
Education Law, Section 3022	6

INDEX

v

Page

NEW YORK CITY CHAPTER

Sections. 801-803	4
Section 903	4, 7, 12

OTHER AUTHORITIES CITED

Interim Report of the Committee on Public Employee Security Procedures	21, 24
Report of the Special Committee on the Federal Loyalty-Security Program by the Association of the Bar of the City of New York	22
Memorandum of Governor upon Approval of Security Risk Law	25
New York State Civil Service Commission, Let- ter from	6, 24

No. 165

MAX LERNER,

vs.

HUGH J. CASEY, WILLIAM C. FULLEN, HARRIS J. KLEIN, HENRY K. NORTON, and DOUGLAS M. WOFFAT, constituting the New York City Transit Authority,

Appellees.

BRIEF FOR THE APPELLANT

Opinions Below

The opinion of the Supreme Court of the State of New York (R. 17-27) is reported at 138 N.Y.S. 2d 777. The opinions of the Appellate Division of the Supreme Court of the State of New York (R. 31-49) are reported at 2 App. Div. 2d 1, 154 N.Y.S. 2d 461. The opinions of the Court of Appeals of the State of New York (R. 50-70) are reported at 2 N.Y. 2d 355.

Jurisdiction

The decree of the Court of Appeals of the State of New York was made and entered on February 28, 1957. The notice of appeal to this Court was filed on April 25, 1957 in the Supreme Court of the State of New York, Kings County. A motion of the appellees, who are sometimes referred to herein as the Transit Authority, to dismiss the appeal, was opposed by appellant. On October 14, 1957 this Court postponed further consideration of the question of jurisdiction until the hearing of the case on the merits (R. 76). The jurisdiction of this Court rests on 28 U.S.C. § 1257 (2).

1. Whether this Court has jurisdiction of the appeal.

2. Whether the dismissal from public employment of a subway conductor with tenure, upon the ground that he is not a good security risk, contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States, where the sole evidence thereof consists of his invocation of his constitutional privilege against self-incrimination.

3. Whether his dismissal for "activities . . . which give reasonable ground for belief that he is not a good security risk" contravenes the due process clause of the Fourteenth Amendment, because *inter alia* he was never served with charges of such activities, there was no hearing, and he has never been informed of the nature of the "activities."

4. Whether a statute which authorizes dismissal from public employment for membership without more in a "subversive organization" impairs freedom of speech, assembly and association under the Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States.

5. Whether the determination that the Transit Authority was a "security agency" and that appellant's work was "necessary to the security and defense of the nation and the state" was in violation of his right to due process under the Fourteenth Amendment when such determination was unrelated to the nature of his work and, further, was without notice to appellant and without evidence or hearing.

6. Whether appellant's privilege against self-incrimination under the Fifth Amendment to the United States

Constitution and his immunities and privileges under the Fourteenth Amendment thereto were abridged by his dismissal from public employment because he had asserted his constitutional privilege in a proceeding conducted by city authorities in pursuance of the federal government's security program.

7. Whether the state court's interpretation and application herein of the privilege against self-incrimination under the State Constitution, Article I, § 6, is not so restrictive and inconsistent with that court's traditional liberal construction and application of the privilege in cases involving public officials, members of the bar and other persons as to deny appellant both due process and the equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

Statutes Involved

This case involves the validity of the so-called Security Risk Law of New York, L. 1951, c. 233, as amended L. 1954, c. 105 (§§1101-1108, McKinney's Unconsolidated Laws), which is set forth in Appendix A. Other New York statutes which are involved are the New York Civil Service Law, L. 1939, c. 547 and L. 1953, c. 19 (§ 12-a and 22 (2) respectively); the New York Public Authorities Law, L. 1953, c. 200 (§ 1800 *et seq.*, now §§1200-1221, L. 1955, c. 914), and the New York City Charter, §§801-803 and 903. Relevant sections of these statutes likewise appear in Appendix A.

The constitutional provisions involved are the First, Fifth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States and Article I, §6 of the Constitution of the State of New York. The pertinent portion of the provision of the State Constitution is set forth in Appendix A.

Statement

Appellant Max Lerner was a subway conductor in the transit system of New York City since November 1, 1935 (R. 6). Appellees, constituting the New York City Transit Authority, a public benefit corporation, were his last employers in such employment. (N.Y. Public Authorities Law, §1801.) Appellant's duties consisted of opening and closing subway car doors (R. 6). He had tenure under the Civil Service Law of New York State (R. 6).

As an employee with tenure, appellant could not be removed prior to the enactment in 1951 of the Security Risk Law "except for incompetency or misconduct" (Civil Service Law, §22 (2)) or for membership in an organization advocating the overthrow of the United States by unlawful means (Civil Service Law, §12-a). If discharged on the

latter ground he would have been entitled to a hearing consisting "of the taking of testimony in open court with opportunity for cross-examination." *See Board of Higher Education of the City of New York v. Board* 219.

On March 24, 1951 New York enacted the Security Law, providing for the summary discharge as security risks of employees in "security positions" or "security agencies" so designated by the State Civil Service Commission. The statute was occasioned by the Korean conflict and was described as a measure to aid the country's defense and foreign affairs. New York Laws 1951, c. 232, §1; 1951 McKinney's Session Laws 1587. It was modeled after the federal statute passed the preceding year which was involved in *Cole v. Young*, 351 U.S. 536. It defined security positions and agencies as those involving the performance of functions "necessary to the security or defense of the nation or the state" or "where confidential information" relating to security might be available (§2).

The State law authorized the suspension of an employee when the employing agency "shall find, after proper investigation and inquiry, that upon all the evidence, reasonable grounds exist for belief that because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state" (§5). The employee was to be notified of the reason "without disclosing confidential sources of information." He had the "opportunity to submit statements or affidavits to show why he should be reinstated or restored to duty." Thereupon his employer might terminate his employment upon making the above finding of "doubtful trust or reliability."

The statute sets forth the kind of evidence of doubtful trust or reliability that may be adduced against an employee:

"In proceedings taken pursuant to this act, evidence shall not be restricted by the rules of evidence and procedure prevailing in the courts. A finding, pursuant to sections four or five of this act, may be based upon evidence of the previous conduct of the applicant, eligible, officer, or employee, as the case may be, which may include to the extent deemed appropriate, but shall not be limited to evidence of (a) previous unauthorized disclosure of confidential information; (b) the commission or attempt to commit an act or acts designed to or tending to undermine, sabotage, hamper or obstruct a program adopted by the agency or department by which he is employed or which affects the security or defense of the nation and the state; (c) treasonable or seditious conduct; and (d) membership in any organization or group found by the state civil service commission to be subversive" (§7).

The "subversive" character of organizations was to be determined by the Commission itself or it could utilize designations by the federal authorities or the State Board of Regents (§8).

On November 23, 1953 the Commission (without notice, hearing or evidence) designated the New York City Transit Authority a security agency (R. 6, 13).¹ On March 24, 1954 the Commission designated the Communist Party a subversive organization under the Security Risk Law, adopting, without notice, hearing or evidence, the finding to that effect made by the New York State Board of Regents under the Feinberg Law, N.Y. Laws 1949, c. 360 (Education Law, Section 3022).

¹ See Fuld, *J.* dissenting below (R. 66, fn. 2). The Commission had advised us by letter, which we have filed with this Court, that no hearing was held or evidence taken.

In September and October 1954, appellant, upon direction from his superiors, appeared before a Deputy Commissioner of Investigation of the City of New York. No charges had been served upon him; he was merely told that an investigation was being conducted under the Security Risk Law and that he would be dismissed under §903 of the New York City Charter if he refused to answer questions (R. 6).² He was then asked whether he was or ever had been a member of the Communist Party and he declined to answer, relying upon his constitutional privilege against self-incrimination (R. 6, 10-11).

Appellant was thereupon suspended by the Transit Authority on the ground that:

"when testifying under oath at the office of the Commissioner of Investigation of the City of New York, you refused to answer questions as to whether you were then a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the United States" (R. 10).

The letter of suspension gave him thirty days to file an answering statement. Since the ground for suspension was limited to his invocation of the constitutional privilege, an act which was not denied, appellant made no further reply (R. 7).

On November 24, 1954, appellant was discharged by the appellees on two grounds: first, that he had asserted his constitutional privilege and, second, that "further investigation has revealed activities on the part of Max Lerner which give reasonable ground for belief that he is not a good security risk" (R. 14).

² This representation with regard to dismissal was inaccurate since appellant was not employed by the City of New York. The Charter provision is that involved in *Slochower v. Board of Higher Education*, 350 U.S. 551.

Appellant instituted this lawsuit in the state Supreme Court to declare invalid his suspension and discharge. His petition asserted, *inter alia*, that the Security Risk Law, as written and applied, and his suspension and discharge, were in violation of his federal constitutional right to due process (R. 8-9).

The lowest state court upheld the validity of the statute and of appellant's suspension and discharge thereunder (R. 17-27). The Appellate Division, one judge dissenting, affirmed the order below (R. 31-49). The Court of Appeals, two judges dissenting, affirmed the order of the Appellate Division (R. 50-70).

The Court of Appeals expressly held that appellant's dismissal for assertion of his constitutional privilege against self-incrimination did not deny him procedural and substantive due process under the Fourteenth Amendment to the Constitution, did not violate his right to freedom of speech, assembly and association under the said Amendment, and did not violate his privilege against self-incrimination under the Fifth Amendment and his immunities and privileges under the Fourteenth Amendment (R. 56-64).

Summary of Argument

1. This Court has jurisdiction because the appeal draws into question the invalidity of the Security Risk Law of the State of New York by reason of its repugnancy to the Constitution of the United States; the decision below is in favor of its validity [28 U.S.C. 1257 (2)].

2. Appellant's dismissal as a subway conductor with tenure, upon the ground that he is a security risk, contravenes the due process clause of the Fourteenth Amendment where the sole evidence thereof consists of the invocation

of his constitutional privilege against self-incrimination. A refusal to answer questions concerning political associations, made in good faith upon constitutional grounds, cannot be evidence that appellant is a security risk. Where the refusal is based upon the constitutional privilege against incrimination, to draw an inference of guilt would be so unreasonable in view of the history and significance of that privilege as to deny due process.

3. To the extent that the dismissal was based upon appellant's "further activities" he was denied due process under the Fourteenth Amendment, for such activities were never specified in the charges, were never sought to be proven, and are not even recited in the Transit Authority's decision suspending and discharging appellant. In addition, the statute, upon its face, denies procedural due process in its provisions for summary discharge without hearing, disclosure of evidence and opportunity for cross examination of adverse witnesses.

4. The statute, whose purpose is to deny public employment to those holding membership in so-called subversive organizations, violates appellant's freedom of speech, belief and assembly and his right to due process under the Fourteenth Amendment. The power of the State to suspend its constitutional guarantees depends upon actual necessity. There was no national emergency in 1954, a year after the end of the Korean conflict, which rationally could justify a state agency's summary discharge of a subway conductor for assertion of his constitutional privilege. A subway conductor who "opens and closes doors" does not occupy a position relating to national security.

5. The state law was passed in aid of the federal government's national security program. The City Commissioner of Investigation, in examining appellant, was in

fact acting as an agent of the federal government. In these circumstances appellant's right to assert his constitutional privilege against self-incrimination is based upon the self-incrimination clause of the Fifth Amendment and is an immunity and privilege under the Fourteenth Amendment.

6. The New York State Constitution contains a clause protective of the privilege against self-incrimination. That clause has been given a broad and liberal construction for many years by the Court below—except in cases such as this, involving political dissent. This discrimination against the very group for whose protection the privilege was originally created denies appellant both due process and the equal protection of the laws under the Fourteenth Amendment.

POINT I

This Court Has Jurisdiction of the Appeal.

This case involves the validity of the state law under the Fourteenth Amendment, which, as construed below, authorizes the discharge as a security risk of an employee with tenure, where the only evidence in support thereof is his invocation of the constitutional privilege against self-incrimination when asked whether he was or had been a member of the Communist Party. This issue was squarely raised and passed upon in the three State Courts (R. 8, 9; 17-20; 31-45; 50-64). One judge in the Appellate Division and two judges in the Court of Appeals agreed with appellant that he had been denied due process (R. 69-73; 86-91).

Appellant's challenge to the validity of the statute on due process grounds is the basis for this Court's jurisdiction under 28 U.S.C. §1257 (2). *Hamilton v. Regents of the University of California*, 293 U.S. 245; *McCullum v. Board of Education*, 333 U.S. 203; *Wieman v. Updegraff*, 344 U.S.

183; *Garner v. Los Angeles Board*, 341 U.S. 716; *Slochower v. Board of Higher Education*, 350 U.S. 551, rehearing denied, 351 U.S. 944; *Uphaus v. Wyman*, 355 U.S. 16.

That the federal issue is a substantial one is indicated by this Court's decision in the *Slochower* case, *supra*, upon which the three dissenting judges in the courts below relied, its decision in *Konigsberg v. The State Bar of California*, 353 U.S. 252, and its recent grant of certiorari in *Board of Public Education, School District of Phila. v. Beilan*, 353 U.S. 964. This appeal involves not only the issues of freedom of association and absence of a hearing presented by *Beilan*, and the power of government to inquire into matters of political association, *Konigsberg v. State Bar of California*, 353 U.S. 252, *Watkins v. United States*, 354 U.S. 178, *Sweezy v. New Hampshire*, 354 U.S. 234, *Uphaus v. Wyman*, *supra*; but the validity of the statutory imposition of sanctions for assertion of the constitutional privilege against self-incrimination.

The issue is an appropriate one for consideration under 28 U.S.C. 1257 (2) because the state courts have construed the state law to authorize the investigation, suspension and discharge of appellant and have upheld the statute against appellant's constitutional attack.

In the event that this Court should determine that an appeal will not lie under 28 U.S.C. 1257 (2), the case should be treated as an appropriate one for certiorari. *Sweezy v. New Hampshire*, *supra*.

POINT II

Appellant's Discharge, Where the Sole Alleged Evidence of His Unreliability Was the Assertion of His Constitutional Privilege, Denied Him Due Process of Law Under the Fourteenth Amendment.

The statute authorizes the discharge of a public servant with tenure upon evidence that "reasonable grounds exist for belief that because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state." The kind of evidence which the statute contemplates is set forth in §7 (Appendix, pp. 35-36).

The only "evidence" in this case was appellant's refusal to answer questions as to membership in the Communist Party, based upon his constitutional privilege against self-incrimination (R. 7, 14, 59).

The Transit Authority and the three courts below decided that appellant was a bad security risk because of his refusal, based upon the privilege, to state under oath whether he was or had been a member of the Communist Party (R. 10, 14).

The Transit Authority put the matter most plainly. The resolution suspending appellant stated that he had "refused to answer questions as to whether or not he was a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the United States" (R. 10).

The state Supreme Court held that the refusal of a public employee to testify "on grounds of self-incrimination" contravened the state's public policy, citing §903 of the City Charter and Article I, Section 6 of the New York State Con-

stitution (R. 24):³ The Appellate Division said that it was "required to and should accept as truthful appellant's claim that truthful answers to the questions propounded might have tended to incriminate him" (R. 35). The Court of Appeals treated the case upon the hypothetical assumption that appellant had appeared twice—once to refuse to answer without reason, and a second time to assert the privilege (R. 60).

However varied the formulation, appellant was dismissed for asserting a constitutionally protected right of silence—which the courts below treated as evidence of "doubtful trust and reliability endangering the security or defense of the nation and the state" (R. 59).

In *Konigsberg v. State Bar of California*, 353 U.S. 252, this Court held that such a conclusion violated the due process clause. It decided that a good faith refusal to answer, upon constitutional grounds, as to Communist Party membership did not permit an adverse inference of doubtful character and loyalty (*id.* at p. 270). It also held that due process required the state to present evidence before it could deny admission to its Bar (*id.* at p. 262).

Appellant's constitutional position is even stronger than *Konigsberg*: (1) admission to the Bar certainly calls for higher standards than work as a subway conductor; (2) traditionally, the states have exercised wide power over admission to the Bar; appellant on the other hand was a civil service employee with tenure resisting dismissal; see *In re Carter*, 192 F.2d 15; *cert. den.* 342 U.S. 862; (3) the statute here permits discharge only upon the basis of "evidence" against the employee; an applicant for admission to the Bar has the burden of proving his good char-

³ That the State Supreme Court was in error in stating the public policy of the state (see cases *infra* p. 28) merely emphasizes the fact that the asserting of the privilege was regarded as evidence of unreliability.

acter; (4) there was some evidence against *Konigsberg*; there is none against appellant.

The adverse inference drawn below from appellant's assertion of the privilege is, of course, completely inconsistent with the decisions of this Court. *Slochower v. Board of Higher Education*, 350 U.S. 551, 557; *Ullmann v. United States*, 350 U.S. 422, 426-466; *Grynwald v. United States*, 353 U.S. 391; *Quinn v. United States*, 349 U.S. 155 and *Johnson v. United States*, 318 U.S. 189, 196-7. Indeed, it is sharply in conflict with the prior decisions of the court below (*infra* p. 28). See also *Travis v. United States*, 247 F.2d 130 (C.A. 10); *United States ex rel. Belfrage v. Shaughnessy*, 212 F.2d 128 (C.A. 2); and *Spector v. United States*, 193 F.2d 1002 (C.A. 9).

The Transit Authority and the three courts below imputed "a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." *Slochower* at p. 640. They overlooked this Court's authoritative reminder: "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances" (*id.* at 641). There is no "rational connection between the fact proved and the ultimate fact presumed" (*Tot v. United States*, 319 U.S. 465, 467), i.e. between the assertion of privilege and the inference of unreliability.

In *Konigsberg*, this Court, in warning against such "unfavorable inferences," cited the cases involving the privilege against self-incrimination. And Mr. Justice Harlan's dissenting opinion pointedly notes: "There is no question here of drawing an unfavorable inference from a claim of the Fifth Amendment privilege. Petitioner repeatedly disclaimed any assertion of that privilege" (353 U.S. at 282, footnote 9).

Judges Fuld and Voorhis, dissenting below, were therefore quite correct in concluding that "invoking the Fifth Amendment does not have probative force to establish that

petitioner has engaged in subversive conduct or to establish that in his position of employment he 'would endanger the security or defense of the nation and the state' and that using it as evidence thereof constitutes a denial of 'due process of law' (R. 70). See also the dissenting opinion of Justice Beldock of the Appellate Division (R. 48-49).

The state courts' reliance upon *Garner v. Los Angeles Board*, 341 U.S. 716 is misplaced, since the New York Security Risk Law does not impose a duty to disclose. In any case, we question whether *Garner* is not overruled by *Konigsberg* or at least is not narrowed to a situation—unlike the present—where the statute gives fair warning that dismissal will follow non-disclosure. It will be recalled that in *Garner*, unlike this case and *Beilan*, the requirement of an affidavit was imposed by explicit statutory language. Finally, *Garner* did not consider the effect of a refusal to disclose based upon the constitutional privilege.

The state courts' attempt to distinguish *Slochower* on the ground that the constitutional privilege was there asserted with respect to a different chronological period is unsupported either by theory or authority. Cf. *Emspak v. United States*, 349 U.S. 190; *Brunner v. United States*, 343 U.S. 918.

The courts below also relied upon the fact that Dr. Slochower's assertion of privilege was before a congressional committee and appellant's before a local official (R. 61, 62). Again, as the dissenting judges noted, that was not the *raison d'être* of the decision (R. 48-49, 68-70). Further, the Commissioner of Investigation was not appellant's employer. The Transit Authority is a corporate entity separate from and independent of the City of New York. The Commissioner is a city official engaged in investigatory functions not dissimilar from those of the Congressional committee in the *Slochower* case. The proceeding before

his deputy was a formal one with the witness under oath and subject both to judicial enforcement and contempt proceedings for refusal to answer and to the dangers inherent in the waiver doctrine. (See *Rogers v. United States*, 346 U.S. 374.) Such an inquisitorial procedure cannot be equated with an employer's inquiry of its own employees concerning matters deemed relevant to their work, as in *Garner*.

Here, as in *Beilan*, the state is confronted by the lack of a disclosure statute which—absent assertion of the constitutional privilege—might have justified a dismissal under *Garner*. It therefore seeks in each case to give a completely artificial concept to the refusal to answer. In *Beilan*, the state argued that the refusal there to surrender constitutional rights is proof of "incompetency"; in this case it is called "evidence" of "unreliability."

There is a significant parallel between the *Beilan* case and the instant one. In each, the federal government, acting through a congressional committee of doubtful authority, *Watkins v. United States*, 354 U.S. 178, placed pressure upon a local government agency to harass local employees although their work bore no relationship to national security. In each, available statutes requiring proof of disloyalty were circumvented. In each, employees with long tenure and excellent employment records were dismissed because each insisted upon "the inviolability of privacy belonging to a citizen's political loyalties" *Sweezy v. New Hampshire*, 354 U.S. at 265.

We suggest that this state-employer pattern of disregarding conventional methods of proof, of by-passing the statutes intended to be used, of treating an assertion of constitutional right as evidence of wrongdoing or misfeasance—is so improper in terms of procedure, objective and effect as to be the very antithesis of due process.

POINT III

The Statute as Written and Applied Violates Procedural Due Process.

A. THE DISCHARGE FOR UNDISCLOSED "ACTIVITIES"

Appellant was compelled to appear before the Commissioner of Investigation without any knowledge of the charges, if any, against him (R. 6-7, 9). As appears above, he asserted his constitutional privilege and no evidence was introduced against him (R. 7). He was thereafter suspended upon charges limited to his assertion of privilege (R. 7, 10). Finally he was discharged, because he had asserted his privilege and because "further investigation has revealed activities on the part of Max Lerner which give reasonable ground for belief that he is not a good security risk" (R. 14).

This action contravened appellant's right to due process, under which he was entitled to (1) reasonable notice of the charges, *In re Oliver*, 333 U.S. 257, 273; *Morgan v. United States*, 304 U.S. 1; (2) "a fair and open hearing" on such charges, *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73; *Morgan v. United States*, *supra*; *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 147 and (3) a decision indicating the nature of the alleged activities.

Appellant has never received notice or charges of such "activities", has not been informed of the evidence of such activities and has not even been told what was intended by that general expression. The discharge for undisclosed reasons not the subject of prior charges or hearing raises "questions of elemental fairness" as serious as those involved in *Konigsberg v. State Bar of California*, 353 U.S.

252; *Cole v. Arkansas*, 333 U.S. 196, 201, and *Parker v. Lester*, 235 F.2d 787 (C.A. 9).

The New York state court has previously held in other cases that employees could not be discharged except upon "the charge litigated"; see *Matter of Meyer v. Goldwater*, 286 N.Y. 461, 463. The instant decision authorizing summary discharge upon grounds not set forth is a radical departure from these standards. It thus denies appellant equal protection of the laws, as well as due process. If the statute authorizes this treatment of employees with tenure, it, as well as the administrative actions and judicial decisions herein, violates the due process provisions of the federal constitution.

B. THE STATUTORY DEFICIENCIES

Until 1951 a New York civil service employee with tenure could not be discharged for membership in an organization advocating the overthrow of the government, in the absence of a judicial hearing in which evidence was presented against him. Section 12-a of the New York Civil Service Law provided in part:

"The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

It was upon this basis that this Court held that the Feinberg Law which implemented §12-a did not deprive New York teachers of procedural due process. *Adler v. Board of Education*, 342 U.S. 485.

Subsequently, in matter of *Hughes v. Board of Higher Education of the City of New York*, 309 N.Y. 319, the Court

of Appeals interpreted and enforced §12-a by holding that the employee had a right to a *de novo* trial in open court regardless of the administrative hearings which had led to his dismissal. That court pointed out that in the *Adler* case "our construction of the *de novo* trial provisions of §12-a as applied to Feinberg Law removals was accepted by the Supreme Court as being part of the protections provided by this state for teachers accused of Communism."

These protections are not given to employees summarily discharged under the Security Risk Law. That statute permits a dismissal upon the basis of charges alone, unsupported by any evidence whatsoever. The employer's action is taken in "its absolute discretion and when deemed necessary in the interests of national security" (§1105). While the statute makes reference to "evidence", it is clear from the statutory language and its application herein that the public agency is merely required to notify the employee "of the reasons for such action", and not of the evidence in support thereof. And even these reasons are not to be fully divulged if they would disclose "confidential sources of information of law enforcement agencies or agencies empowered or required by law to investigate subversive activities or disloyalty" (§1105).

It is most difficult to perceive how national security can be adversely affected by a state's revelation of the reasons for a summary discharge of one of its employees. In any event, those protections, namely, a hearing with the taking of testimony, the opportunity for cross-examination, and the burden of sustaining the charges upon the employer—which led this Court and the New York Court of Appeals to their conclusions in the *Adler* case, are all lacking in the present one. On its face the Security Risk Law denies appellant and all other employees the procedural due process guaranteed by the Fourteenth Amendment.

POINT IV

The Statute's Proscription of Membership in So-Called "Subversive" Organizations Violates Freedom of Speech, Belief, Assembly and Association Under the Fourteenth Amendment.

A. FREEDOM OF ASSOCIATION

The foundation stone of the statute is "membership in any organization or group found by the State Civil Service Commission to be subversive" (§7). This is the section pursuant to which employees are investigated; it is the section under which they are discharged.

The subject matter of the other subdivisions, which involve reprehensible, usually criminal, conduct has not aroused interest in those responsible for enforcing the Security Risk Law. The authorities have been concerned exclusively with acts of association which this Court has held to be protected by the First Amendment. In this respect they have followed directly in the paths of many legislative committees, public employers and state agencies this past decade. *Konigsberg v. State Bar of California*, *supra* and cases therein cited; *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, and *ftn. 13*; *Wieman v. Updegraff*, 344 U.S. 183.

The right to join a political party and to participate in its meetings is guaranteed by the First Amendment and the due process clause of the Fourteenth. *DeJonge v. Oregon*, 299 U.S. 353. Government employees are not stripped of constitutional rights by virtue of their employment. *Wieman v. Updegraff*, *supra*, at 191-2.

The power of the state to suspend these constitutional guarantees depends upon actual necessity. *American Com-*

munications Association v. Douds, 339 U.S. 382; *Herndon v. Lowry*, 301 U.S. 242, 258.

—This Court is not bound by executive declarations of emergency where an actual emergency is a constitutional prerequisite to a limitation upon the constitutional rights of citizens. *Block v. Hirsh*, 256 U.S. 135; *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547, 548; *Perrin v. United States*, 232 U.S. 478; *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442. It can review the situation and determine whether an emergency continues to exist and whether there is an actual need to exercise the emergency powers affecting personal liberties.

Despite the preamble to the Security Risk Act, the Korean conflict did not give rise to an emergency requiring a security program for state and city employees. Certainly there was no national emergency at the time of appellant's discharge in 1954, a year after the end of the Korean conflict, which rationally could justify the summary discharge of a subway conductor for political associations, much less for asserting his constitutional privilege on the subject. Appropriately, the assertion of emergency appearing in the original Security Risk Law was never repeated in the routine reenactments of that statute.

Hence, Governor Harriman's Committee on Public Employee Security Procedures filed an interim report on January 28, 1957 criticizing the State Civil Service Commission for its designation of governmental departments as security agencies whose "immediate connection with the security and defense of the nation and the state is not readily discernible" (Interim Report of Committee on Public Employee Security Procedures, Appendix B herein, pp. 42-46). A distinguished Bar Association committee made a similar criticism with respect to the national program equally applicable here. (Report of the Special Com-

mittee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York (1956) p. 141.)

Finally, the most authoritative recognition of the realities and of the constitutional problems involved appears in this Court's decision in *Cole v. Young*, 351 U.S. 536. In that case this Court examined the federal statute, the Act of August 26, 1950, 64 Stat. 476 (5 USCA §22-1), upon which the New York Security Risk Law was based. The federal statute provided for the summary dismissal of employees whose work affected national security. It had been construed by the President as permitting the designation of virtually every branch of the Government as a security agency, precisely the procedure followed by the State Civil Service Commission herein.

This Court held that so broad a construction of the statute was improper and unreasonable and that the term "national security" must be given a fair and realistic meaning. *Cole v. Young*, 351 U.S. 536. While this Court may not have the same power to construe state law, it can determine, particularly in view of the federal origins of the statute here involved, that the construction below is so arbitrary and unreasonable as to deny due process. Alternatively, it may conclude that a statute, thus broadly construed, is an unwarranted interference with freedom of association.

The foregoing discussion shows that the statute and the Commission's general implementation of it unreasonably interferes with First Amendment freedoms in violation of substantive due process. This becomes even plainer in the attempted application of the statute to appellant.

B. APPELLANT'S INNOCUOUS WORK

It is ludicrous to say that a subway conductor is engaged in work necessary to national security and defense. His

primary duties "consist of opening and closing subway car doors to permit the entrance and exit of passengers together with certain routine duties incidental thereto" (R. 6). His place of work is one of the subway cars which carry millions of passengers daily. It is irrational to discharge him for political reasons—particularly for the assertion of a constitutional right—since his fellow passengers continue to travel in the same subway cars without security clearance, upon the mere payment of their fares.⁴ Appellant himself is not barred from riding on the very subway cars in which he has been denied the right to act as conductor.

The State Civil Service Commission sought to avoid a determination that appellant's position was related to national security or defense by declaring the entire Authority a security agency, thereby making washroom attendants, clerks and subway conductors subject to this statute. Obviously, such a determination was not, indeed could not be, based upon evidence. The record, as Judge Fuld notes below, "tells us nothing of the steps taken by the Commission in reaching its determination."⁵ However, the Com-

⁴ As the Bar Association Committee notes: "If the nation embarks upon personnel security clearance of employees to prevent sabotage in one segment of industry, the logic of the policy would call for its extension widely through industry and business. Indeed, even this would not suffice, because this way any employees of important industry establishments can still sabotage them." This logic would thus lead to peacetime personnel security clearance for almost all citizens. The danger to liberty from such a course should cause us to set ourselves resolutely against it (p. 144).

⁵ He added: "Moreover, we are left completely in the dark as to whether the appellant or others affected were notified that the matter was under consideration, or even that the determination had been made. (Security Risk Law, §§2, 3; cf. *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 165 *et seq.*, per Frankfurter, J., concurring). We are not even told where the determination of the commission is to be found or whether any opportunity was afforded for the prescribed judicial review (§§3, 4; cf. *Adler v. Board of Educ.*, 342 U.S. 485, 490)" (R. 66).

mission has elsewhere advised us that its determination was not based upon the taking of evidence but upon discussions with some of the agencies involved.*

The designation of the Transit Authority as a security agency, two years after the promulgation of the statute and subsequent to the end of the Korean conflict, was unrelated to genuine security considerations. The designation was made closely following hearings conducted by the House Committee on Un-American Activities that year. (See *Interim Report of the Committee on Public Employee Security Procedures*, Appendix B, p. 44.) These federal pressures upon the Commission are hardly a substitute for the evidence required by the due process clause.

C. THE STATUTORY DISREGARD OF OTHER ASPECTS OF SUBSTANTIVE DUE PROCESS

The statute on its face, and as applied, is subject to two other objections under the Fourteenth Amendment.

It makes "membership in any organization or group found by the State Civil Service Commission to be subversive" a ground for discharge. The statute does not require *scienter* before the dismissal of an employee. In this respect it does not meet the test of validity imposed by this Court in *Wieman v. Updegraff*, 344 U.S. 183.

Secondly, the Security Risk Law does not limit dismissals to persons who remain members of an organization after its proscription. This is in sharp contrast with the New York *Feinberg Law* which, pursuant to the implementing regulations of the Regents, gave employees this opportunity to resign after they were aware of the administrative characterization of their organization. (*Adler v. Board of Edu-*

* Letter dated Nov. 1, 1956, on file with the Clerk of the Court.

cation, 342 U.S. 485, 491.) A statute such as the Security Risk Law, which penalizes employees for their past political activities, has so much of the *ex post facto* and attainder about it that it impairs due process rights under the Fourteenth Amendment.

POINT V

The Statute Impaired Appellant's Constitutional Privilege Against Self-Incrimination Under the Fifth Amendment and His Privileges and Immunities Under the Fourteenth Amendment.

The Security Risk Law was passed in aid of the federal government's national security program. It is described as an Act relating to public employment "deemed dangerous to the national welfare, safety and security" (L. 1951, c. 233, Preamble). The state legislature declared that the Korean conflict had created a national emergency and referred to the President's declaration of such emergency "calling for the intensive and concentrated mobilization and utilization of the resources and facilities of the nation and for the coordination and direction of state and local activities relating to civilian protection and to state and national defense" (§1). It found "that the employment of members of subversive groups and organizations by Government presents a grave peril to the national security" (*id.*).

Governor Dewey described the bill as "a temporary measure designed to insure the greatest possible cooperation of state agencies with federal agencies in providing for the defense of this country and supporting its policies in foreign affairs." (Governor's Memorandum, New York Unconsolidated Laws, § 1101 *et seq.* pocket part, p. 31.)

The statute authorizes the Civil Service Commission (a) to accept under certain circumstances the United States

Attorney General's findings as to the subversive character of organizations (§8), and (b) to enter into contracts with the federal authorities "for the supplying of . . . assistance necessary for the performance of its duties pursuant to this act" (§8).

We have also seen that the designation of the Transit Authority as a security agency directly followed the arrival in New York of the House Committee on Un-American Activities (*supra*, p. 24).

The Deputy Commissioner of Investigation acted as an agent of the federal government when he examined appellant under this law relating to "security or defense of the nation" (§1). Further relevant information given the state in this loyalty-security area would undoubtedly be transmitted to the Federal Bureau of Investigation (see, e.g., *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 498, 506, 519, ftn. 10).⁷ Since appellant could have asserted his constitutional privilege in a federal proceeding, without state sanctions, *Slochower v. Board of Higher Education*, 350 U.S. 551, he had the same right in the hearing conducted by the City Commissioner, purportedly acting in the national interest. For appellant's rights against the agent could not be less than those against the principal.

The situation here is analogous to that in *Gambino v. U. S.*, 275 U.S. 310, 319, where the "peculiar relation borne in New York . . . by state officers to federal prohibition enforcement" led to reversal of a federal conviction based upon evidence unlawfully seized by state officials. The relationship between state and federal authorities in the area of subversive activities generally and under this statute in

⁷ In *Braden v. Commonwealth of Kentucky*, 291 S.W.2d 843 (Ky.), a prosecution under a state sedition law, the prosecution's witnesses were supplied by the House Committee on Un-American Activities and by the Federal Bureau of Investigation.

particular is even closer. If the state is not precluded under *Commonwealth of Pennsylvania v. Nelson, supra*, from protecting the national interest by a state sedition law relating to its employees—an issue not there resolved—it is at least subject in that situation to the constitutional limitations imposed upon national power.

Appellant's right to assert his constitutional privilege with respect to federal crime in what amounts to a federal proceeding (however denominated) is a privilege of national citizenship. His dismissal abridged his privileges and immunities, since they "arise out of the nature and essential character of the national government" (*Twining v. New Jersey*, 211 U.S. 78, 97).^{*} The issue was raised by appellant below (R. 13, 14; cf. *Slochower v. Board of Higher Education, supra*, at 639, 646). If necessary to the decision in this case, this issue should therefore be resolved in favor of appellant.

POINT VI

The Denial to Appellant of His State Constitutional Privilege Against Self-Incrimination Denied Him Due Process and the Equal Protection of the Laws Under the Fourteenth Amendment.

Article I, §6 of the State Constitution provides that one shall not "be compelled in any criminal case to be a witness against himself."⁹ This section has been given a broad and

^{*} In view of the federal purpose of the statute and the role of the Commissioner of Investigation, as federal agent, it is not necessary for appellant to seek reconsideration by this Court of the decision in *Adamson v. California*, 332 U.S. 46.

⁹ The constitutional exception of a state employee refusing to "testify concerning the conduct of his office or the performance of his official duties before a grand jury" is obviously inapplicable here.

liberal construction for many years in the court below in favor of the citizen. *In re Grae*, 282 N.Y. 428; *People ex rel. Taylor v. Forbes*, 143 N.Y. 219, 227; *Matter of Doyle*, 257 N.Y. 244; *People v. Harris*, 294 N.Y. 424; *People v. Doyle*, 1 N.Y. 2d 732; *Matter of Kaffenburgh*, 188 N.Y. 49.¹⁰

This construction may be illustrated by a few examples: In *People v. Harris*, *supra*, the Court of Appeals extended the constitutional language protecting the privilege by holding that the Albany Water Commissioner did not forfeit public employment after his refusal to testify, but could be given a new office of "Superintendent of Water Rent Delinquencies."

In *People v. Doyle*, 1 N.Y. 2d 732, affirming 286 App. Div. 276, the Court of Appeals again chose an interpretation most protective of the privilege. It held that the Surrogate of Saratoga County could retain his position while refusing to testify as to his prior stewardship as District Attorney. In the *Grae* and *Kaffenburgh* cases, *supra*, it held that

¹⁰ Thus:

"The privilege against self-incrimination is a constitutional guaranty of a fundamental personal right." (*Matter of Grae* at 434.)

"It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the State; and neither legislators nor judges are free to overleap it." (*Matter of Doyle* at 250.)

"The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court." (Lazansky, P.J., dissenting in *Matter of Ellis*, 258 App. Div. 558, 572, reversed, 282 N.Y. 435; dissenting opinion approved in *Matter of Grae*, 282 N.Y. 428.)

"When a proper case arises, they (constitutional and statutory provisions against self-incrimination) should be applied in a broad and liberal spirit, in order to secure to the citizen the immunity from every species of self-accusation implied in the brief but comprehensive language in which they are expressed." (*Matter of Kaffenburgh*, 188 N.Y. 49, 53.) (Language in parentheses supplied.)

members of the Bar, despite their positions as officers of the Court, were entitled to assertion of the privilege without penalty.

Examples could be multiplied to show the insistence by the Court of Appeals upon a liberal construction of the privilege in favor of the witness, repeated warnings by it against any inference of guilt and refusals by it to permit the imposition of governmental sanctions.

The only persons in the State of New York punished under the decisions of the court below for invocation of the privilege are those involved in so-called security cases. This was first done in the state court's decision in *Daniman v. Board of Education*, 306 N.Y. 532, reversed in part; *sub nom.*, *Slochow v. Board of Higher Education*, 350 U.S. 551. This policy is carried further by the present decision, which equates assertion of the privilege with evidence of guilt.

Discrimination against a particular class, by judicial interpretation of state statute or constitution, denies equal protection of the laws under the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 14. The discrimination and classification is particularly unreasonable where it is directed against persons accused of political dissidence, the very group intended to be protected by the Fifth Amendment. *Quinn v. United States*, *supra*, p. 163, fn. 31. New York stands alone in its imputation of guilt. Florida has only recently decided otherwise. *Sheiner v. Florida*, 82 So. 2d 657, cited in *Konigsberg v. State Bar of California*, *supra*, p. 270, fn. 31. The special treatment accorded appellant is so unreasonable, particularly in view of the history and purposes of the constitutional privilege, that it constitutes a denial both of due process and of equal protection of the laws under the federal constitution.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

The Security Risk Law

The Security Risk Law of New York, Chapter 233, Laws of 1951, as amended by Chapter 105, Laws of 1954, effective March 15, 1954, read as follows at the time of appellant's suspension and discharge:

"An Act to amend chapter two hundred thirty-three of the laws of nineteen hundred fifty-one, entitled 'An act declaring the existence of a public emergency and authorizing the disqualification of applicants and eligibles for entrance into public service, and the suspension and removal or transfer of officers and employees in the service of the state and its civil divisions, whose appointment or continued employment during the emergency is deemed dangerous to the national welfare, safety and security,' in relation to the adoption by the state civil service commission of designations of subversive organizations made by the United States attorney general or the state board of regents, and by extending its provisions to June thirtieth, nineteen hundred fifty-five."

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1: Declaration of legislative findings and intent. The legislature hereby finds and declares the existence of a serious public emergency in this state resulting from the following acts and events among others: the mandate of the United Nations to its armed forces, including those of the United States, to repel armed aggression against the government and the people of Korea south of the 38th Parallel; the proclamation by the president of the United States of America declaring the existence of a national emergency and calling for the intensive and concentrated mobilization and utilization of the resources and facilities of the nation and for the coordination and direction of state and local activities related to civilian protection and to state and national defense. The legislature also finds that

the employment of members of subversive groups and organizations by government presents a grave peril to the national security. These groups and organizations are frequently well organized and rigidly disciplined, and often, under the direction and control of a foreign power, are dedicated to the task of bringing about the overthrow of existing legally constituted government by any available means, including force if necessary. If members of such organizations and groups and persons concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in public service in security positions would endanger the security or defense of the nation and the state, are permitted to hold public office and employment, their retention in security positions during the existence of a national emergency would imperil or endanger the safety, welfare or best interests of the armed forces, the civilian defense forces and the people of this state and of the United States. In view of this imminent and great danger to our national security, it is vital and essential that measures be taken to effect the disqualification for entrance into and the suspension and removal from security offices and positions in governmental service of persons concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in security positions would endanger the security or defense of the nation and the state. In consequence thereof, the necessity for the enactment of this act and for the operation and effectiveness of its provisions during the period of such emergency, beginning from the date this act takes effect and terminating on the thirtieth day of June, nineteen hundred fifty-two, are hereby declared as a matter of legislative determination.

§2. Definitions. (a) The term "security agency" as used in this act shall mean any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential information relating to the security or defense of the nation and the state may be available.

(b) The term "security position" as used in this act shall mean (1) any office or position in the public service which

requires the performance of functions which are necessary to the security or defense of the nation and the state; or (2) any office or position in any public agency or department where confidential information relating to the security or defense of the nation and the state may be available.

§3. Determination of security agency and security position. Upon its own initiative or whenever requested by the head of any department, bureau, division or other agency of the state government, or by any municipal civil service commission, or board, or body, authorized by law to conduct examinations and certify eligibles for positions in the service of the state or its civil divisions, the state civil service commission shall determine whether or not (1) an agency is a security agency within the meaning of section two (a) of this act, or (2) a position is a security position within the meaning of section two (b) of this act. Such determination by the state civil service commission shall be subject to review by the courts in accordance with the provisions of article seventy-eight of the civil practice act.

§4. Disqualification of applicant or eligible. The state civil service commission or other board or body authorized by law to conduct an examination and certify an eligible for appointment to a security position in governmental service shall refuse to examine an applicant for, or after examination, to certify an eligible to, such position if it finds, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such applicant or eligible would endanger the security or defense of the nation and the state.

§5. Suspension and removal or transfer. Any public officer, board, body or commission of the state or of any civil division thereof authorized by law, rule or regulation to exercise the power of appointment may, in his or its absolute discretion and when deemed necessary in the interests of national security, transfer, subject to the approval of the civil service commission having jurisdiction, to a position other than a security position or to an agency other than a security agency, or suspend without pay any officer or employee under his or its appointive jurisdiction

occupying a security position or a position in a security agency, whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state. The officer or employee with respect to whom such action was taken shall be notified that such action was taken pursuant to this section and, to the extent possible without disclosing confidential sources of information of law enforcement agencies, or agencies empowered or required by law to investigate subversive activities or disloyalty, the reasons for such action. Within thirty days after such notification, such person shall have an opportunity to submit statements or affidavits to show why he should be reinstated or restored to duty. Following such further investigation and review as he or it shall deem necessary, the officer, board, body or commission taking such action shall affirm the transfer or terminate the employment of such officer or employee if he or it shall find, that, upon all the evidence, reasonable grounds exist for the belief that, because of doubtful trust and reliability, the employment of such person in a security position or in a security agency would endanger the security or defense of the nation and the state. If the officer, board, body or commission finds no reason to warrant the transfer or removal of such officer or employee, he shall be restored to his position and if such officer or employee has been suspended from his position, he shall, upon restoration, be entitled to back pay for the period of his suspension.

§6. Appeal to state civil service commission. Any person who believes himself aggrieved by a determination of disqualification under the authority of section four of this act and any officer or employee who believes himself aggrieved by a determination of transfer or dismissal under the authority of section five of this act may appeal from such determination by an application in writing to the state civil service commission within twenty days after receiving written notice of such determination. Such commission

shall set a time and place for the hearing of such appeal and give due notice thereof to the appellant and to the officer, board, body or commission whose determination is under review. The hearing shall be held by the commission or by a person or persons, not exceeding three, designated by the commission in writing to hear such appeal in its behalf. The Commission, in its discretion, may designate such person or persons to hear and determine said appeal or to hear and report to the commission and, in the latter event, the report shall be acted upon by the entire commission. The persons so designated by the commission may be officers or employees of the civil service of the state. They shall have the power to require amplification of the reasons for the action appealed from and to administer oaths, hold or conduct public or private hearings, subpoena and compel the attendance of witnesses, and the production of books, papers, records and documents. The person or persons holding such hearing shall make such inquiry as may be deemed advisable, and shall upon the request of the appellant permit him to be represented by an attorney and to present evidence in his behalf. The Commission or the person or persons authorized to hear and determine such appeal may affirm, reverse or modify the findings and determination under review and, in the case of reversal, shall order the reinstatement of the appellant, and if such appellant had been dismissed from his position, he shall, upon restoration, be entitled to back pay from the date of his suspension. The commission may direct the transfer of an appellant to a similar position in another division or department other than a security position or a position in a security agency, or may direct that his name be placed upon a preferred list pursuant to section thirty-one of the civil service law for reinstatement to a position other than a security position or a position in a security agency. The decision of the commission or the person or persons designated by it to hear and determine such appeal shall be final and conclusive and shall not be subject to review in any court.

§7. Evidence. In proceedings taken pursuant to this act, evidence shall not be restricted by the rules of evidence and procedure prevailing in the courts. A finding, pursuant to

sections four or five of this act, may be based upon evidence of the previous conduct of the applicant, eligible, officer, or employee, as the case may be, which may include to the extent deemed appropriate, but shall not be limited to evidence of (a) previous unauthorized disclosure of confidential information; (b) the commission or attempt to commit an act or acts designed to or tending to undermine, sabotage, hamper or obstruct a program adopted by the agency or department by which he is employed or which affects the security or defense of the nation and the state; (c) treasonable or seditious conduct; and (d) membership in any organization or group found by the state civil service commission to be subversive.

§8. Subversive groups and organizations. As used in this act, a subversive group or organization shall be one which is found by the state civil service commission, after inquiry, and after such notice and hearing as may be appropriate, to advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or to advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. The commission, in making such inquiry, may utilize any listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, or by the state board of regents, and for the purposes of such inquiry the commission may request and receive from said federal agencies or authorities or state board of regents, any supporting material or evidence that may be made available to it. Where any organization or group has been so designated by the United States attorney general pursuant to executive order number ten thousand four hundred fifty, of April twenty-seventh, nineteen hundred fifty-three or any executive orders or regulations amendatory or supplemental thereto, or by the state board of regents pursuant to section three thousand twenty-two of the education law, or any acts amendatory or supplemental thereto, the state civil service commission may adopt such designation for the purposes of this act, provided such des-

ignation by the United States attorney general or the state board of regents was made after due notice to such organization or group and an opportunity afforded it to answer.

§9. To the extent of appropriations available therefor, the civil service commission is authorized to enter into contract with the federal bureau of investigation, the United States department of justice, or any other appropriate public agency for the supplying of information in making investigations, or any other assistance necessary for the performance of its duties pursuant to this act.

§10. The provisions of this act shall be controlling notwithstanding the provisions of any other general, special or local law.

§11. The provisions of this act shall remain in effect until June thirtieth, nineteen hundred fifty-five.

§12. This act shall take effect immediately.

Since its original passage in 1951, the statute has been extended six times for additional one year periods. L. 1952, c. 46; L. 1953, c. 26; L. 1954, c. 105; L. 1955, c. 156; L. 1956, c. 310; L. 1957, c. 176. No changes were made in its text except for an amendment to §6 in 1953 to permit representation by counsel. L. 1953, c. 26, and an amendment in 1954 adding the last sentence to §8. L. 1954, c. 105.

NEW YORK STATE CONSTITUTION:

Article I, Section 6:

"... No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for

a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general.

NEW YORK CITY CHARTER

"§801. Department; commissioner.—There shall be a department of investigation the head of which shall be the commissioner of investigation who shall be appointed by the mayor. He shall be a member of the bar of the state of New York in good standing."

"§802. Deputies.—The commissioner may appoint two deputies, either of whom may, subject to the direction of the commissioner, conduct or preside at any investigations authorized by this chapter."

"§803. Powers and duties.—The commissioner:

1. Shall make any investigation directed by the mayor or the council.

2. Is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."

"§903. Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employ-

ment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

NEW YORK CIVIL SERVICE LAW

"§12.a. Ineligibility

No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a

hearing on such charges should not be had: Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility. Added L. 1939, c. 547; amended L. 1940, c. 564, eff. April 17, 1940."

NEW YORK CIVIL SERVICE LAW

§22 (2)

"... No officer or employee holding a position in the competitive class of the civil service of the state, or any civil division or city thereof, shall be removed except for incompetency or misconduct."

PUBLIC AUTHORITIES LAW

"§1201. New York City Transit Authority

1. A board, to be known as 'New York City Transit Authority' is hereby created. Such board shall be a body corporate and politic constituting a public benefit corporation. It shall consist of three members. One member shall be appointed by the mayor, and one member shall be appointed by the governor. After the appointment and qualification of such two members, they shall, as promptly as possible, appoint a third member who shall be chairman of such board."

"§1210. Employees

1. Employees in the competitive and labor classes of the classified service in the employ of the board of transportation and performing services in respect to subjects or matters, jurisdiction of which was transferred to the authority, with the approval of the authority shall be transferred to comparable positions in

the employ of the authority; and, any officers and other employees of such board of transportation may be so transferred and appointed by the authority.

2. The appointment, promotion and continuance of employment of all employees of the authority shall be governed by the provisions of the civil service law and the rules of the municipal civil service commission of the city. Employees of any board, commission or department of the city may be transferred to positions of employment under the authority in accordance with the provisions of the civil service law and shall be eligible for such transfer and appointment without examination to such positions of employment. Employees who have been appointed to positions in the service of the city under the rules of the municipal civil service commission of the city shall have the same status with respect thereto after transfer to positions of employment under the authority as they had under their original appointments. Employees of the authority shall be subject to the provisions of the civil service law.

APPENDIX B

Interim Report of the Committee on Public Employee Security Procedures

The Committee on Public Employee Security Procedures, appointed by Governor Harriman on September 15, 1956 for the purpose of studying New York State laws relating to the loyalty and security of public employees, hereby submits an interim report.

The Committee has held numerous meetings to learn the view of interested persons and organizations. It has also made its own studies of the relevant laws and held one public hearing. Some thirty-one individuals or organizations have been heard. Government officials, federal, state and city, have been consulted.

Within the time available to it, the Committee has not been able to complete its investigations, and it is unable to make a final report at this time. However, the Committee can now express certain conclusions with respect to the manner in which existing laws have operated.

At the present time there are two basic laws in effect.

Section 12-a of the Civil Service Law, passed in 1939, provides, in substance, that no person shall be appointed to, or continue in, any public office or position, who "willfully and deliberately advocates" that the government "should be overthrown" by "force, violence or any unlawful means," or who prints, publishes or sells any printed matter advising such doctrine, and advocates the duty or propriety of adopting such doctrine, or who "organizes" or "becomes a member" of any group which "teaches or advocates" such doctrine. The accused may obtain from the Supreme Court a hearing in open court as to the validity of the dismissal or disqualification. He is accorded the opportunity for cross examination, and the burden is on the employing officer to sustain the order of dismissal or ineligibility "by a fair preponderance of the credible evidence."

In 1951 the other measure, temporary legislation known as the Security Risk Law (Section 1101-1108, Unconsolidated Laws), was passed. Since 1951 it has been reenacted

each year, and it now remains in effect until June 30, 1957. This law declares that an emergency exists by reason of the Korean conflict, and provides that public employees in "security agencies" and "security positions" may be removed or disqualified where "reasonable grounds exist for belief that, because of doubtful trust and reliability," their employment "would endanger the security or defense of the nation and the state." The Security Risk Law does not provide for hearing in court with opportunity for cross-examination as to the validity of a discharge. The law gives the accused a right of appeal to the State Civil Service Commission or someone designated by it who "shall make such inquiry as may be deemed advisable." A discharge may be based upon evidence which would not be admissible in court, and upon "confidential sources of information" which need not be disclosed to the accused. The responsibility for determining what is a "security agency" and what a "security position" is assigned by the law to the State Civil Service Commission in accordance with the following definitions:

"(a) The term 'security agency' as used in this act shall mean any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential information relating to the security or defense of the nation may be available.

"(b) The term 'security position' as used in this act shall mean (1) any office or position in the public service which requires the performance of functions which are necessary to the security or defense of the nation and the state; or (2) any office or position in any public agency or department where confidential information relating to the security or defense of the nation and the state may be available."

The Security Risk Law of 1951 was based upon the premise that there were truly sensitive positions in New York public employ where persons of doubtful trust and reliability could "endanger the security or defense of the nation

or the state." In such instances the Legislature deemed that summary procedure for removal, with relaxed standards of proof and without the personal safeguards of court trial, confrontation of witnesses, and the like, was justified. However, Section 12-a of the Civil Service Law, permits an employee discharged on loyalty grounds to have a court trial with opportunity for cross-examination and with the burden of proof on the discharging officer. Since persons in sensitive positions would be discharged under the Security Risk Law, the Legislature, by leaving in effect Section 12-a of the Civil Service Law, recognized that the badge of disloyalty should not be affixed to persons employed in non-sensitive positions in disregard of some of our ancient procedural safeguards.

When the Security Risk Law became effective in the spring of 1951, the State Civil Service Commission announced that it would not undertake to determine "security agencies" and "security positions" in the absence of a request by the department concerned. No such request was made for more than two years. In 1953, after a sub-committee of the House Un-American Activities Committee had held hearings in the state, a wave of activity by the State Civil Service Commission took place, and it commenced to specify "security agencies" and "security positions." The Commission, which did not have the benefit of any court decisions construing these broad terms, has to date designated some twenty agencies in the state and some forty units of the New York City government as "security agencies" or as having "security positions" within them. The immediate connection with the "security or defense of the nation and the state" of many of these agencies and positions is not readily discernible. For example, scientists in the Paleontology Section of the Department of Education have been specified as holding "security positions," on the ground that they have knowledge concerning the location of caves and their suitability for defense storage purposes. The Department of Sanitation of the City of New York has been designated as a "security agency" on the theory that disease might spread in the event that department did not perform its duty. Even probation service of the New York City Domestic Relations Court has been designated as a

"security position," though it would seem to have no relationship to the "security or defense of the nation and the state." One might expand at length the list of agencies or posts which have been denominated "security" though they have remote, if any, connection with matters which that term ordinarily connotes.

Under these broad designations 141,686 persons have been checked for employment in state agencies, and 13 have been disqualified or have resigned after investigation. The Committee is informed that in New York City some 100,000 employees have been investigated. Of those checked in New York City some 34 have resigned and some 17 have been dismissed. Approximately eighty-one percent of all employees of New York City are in agencies or positions which have been designated as "security." The Committee has been told that in the state government in the neighborhood of thirty percent of the employees are in "security" positions or agencies.

The Committee believes that the interpretation which has been given in the past by the State Civil Service Commission to the terms "security agency" and "security position" is inconsistent with the basic purpose of a "security" law. That purpose is to permit relatively summary and sometimes arbitrary removals from places which may fairly be denominated "sensitive" in relation to the safety or defense of our nation or our state.

Since the Committee is not yet in a position to propose comprehensive suggestions and needs further time for study, it suggests that the Security Risk Law be reenacted for one more year, but with appropriate amendments restricting its application to positions more closely related to security or defense, so that effort may be concentrated in areas of greatest sensitivity.

The Committee deems the proper measure of a "security" position within the meaning of the Security Risk Law to be whether the occupant has access to material classified as secret or top secret by the federal government or has opportunities substantially greater than those available to members of the public generally by disclosure of secret information or by sabotage to endanger the security of the nation or the state. While we have not yet discovered that

any such classified material reaches the eyes of New York employees, we are attempting to obtain definitive advice on this and other subjects from the responsible officials of the federal government. To subject to summary removal procedures and the label of disloyalty, without benefit of court trial, presumption of innocence, and confrontation of witnesses, employees who are not more advantageously situated to commit espionage or sabotage than is the ordinary citizen, is to run counter to our history of personal rights.

The Committee therefore recommends that the Security Risk Law be reenacted for one more year with amendments to eliminate the provision for the designation of "security agencies" and to make the law applicable only to "security positions," to be defined as follows:

"any position in the public service the occupant of which would (a) have access to material classified by federal authorities as secret or top secret, or (b) have opportunities substantially greater than those available to the general public, by disclosure of secret information or by sabotage to endanger the security of the state or nation."

By thus restricting the Security Risk Law to positions which may be deemed sensitive, it will be possible to concentrate on more vital positions, and avoid dissipation of effort. The Committee believes that this will result in more effective protection of the security of the state and nation.

As already stated, this is merely an interim report, and should not be construed as any indication that the Committee has made any other determination as to present laws relating to loyalty and security. These matters are still under study and will require further investigation before the Committee can express its convictions.

Respectfully submitted,

WHITELAW REID, *Chairman*

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IN THE

Supreme Court of the United States

October Term, 1957

No. 165

MAX LERNER,

Appellant,

VS.

**HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J.
KLEIN, HENRY K. NORTON, and DOUGLAS M.
MOFFAT, constituting the New York City Transit
Authority,**

Appellees.

APPELLANT'S REPLY BRIEF

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INDEX

SUBJECT INDEX

	PAGE
I. Jurisdiction	1
II. The Confessed Cause of Appellant's Dismissal	4
III. The Nature of the Inquiry Before the City Commissioner of Investigation	6
IV. Appellees' Attempt to Distinguish <i>Slochower</i>	9
V. The effect of the <i>Konigsberg</i> case	10
VI. The Right of Association	11
VII. The Federal Privilege Against Self-Incrimination	12
Appendix A	13
Appendix B	15

Citations

CASES:

Adamson v. California, 332 U. S. 46	12
Emspak v. United States, 349 U. S. 190	5
Garner v. Los Angeles Board, 341 U. S. 716 4, 5, 6, 8, 10, 11	
Gerende v. Election Board, 341 U. S. 56	11
Graham v. Falk (S. D. N. Y., Civ. Act. No. 130-51)	9
Hehir v. New York City Transit Authority (N. Y. Sup. Ct., Kings Co., #4071 (1956))	9
Konigsberg v. The State Bar of California, 353 U. S. 252	10, 11
Levitch v. Board of Education, 243 N. Y. 373	2
New York City Housing Authority, Matter of v. Falk, N. Y. L. J., Jan. 10, 1958	4

CASES (cont'd):

Slochower v. Board of Higher Education, 350 U. S. 551, rehearing, denied, 351 U. S. 944	5, 8, 9, 10, 11
Ullmann v. United States, 350 U. S. 422	5
Wieman v. Updegraff, 344 U. S. 178	11
Wiener, In re, 183 Misc. 267	6

Constitutional Provisions and Statutes Cited**CONSTITUTION OF THE UNITED STATES:**

Fifth Amendment	5, 10, 11, 12
------------------------	----------------------

NEW YORK STATUTES:

Feinberg Law, Education Law, §3022	11
Security Risk Law, L. 1951, c. 233 as amended	2, 5, 9, 10, 11

NEW YORK CITY CHARTER:

Section 803	6, 7, 10
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IN THE
Supreme Court of the United States

October Term, 1957

No. 165

MAX LERNER,

Appellant.

vs.

**HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN,
HENRY K. NORTON, and DOUGLAS M. MOFFAT, constituting
the New York City Transit Authority,**

Appellees.

APPELLANT'S REPLY BRIEF

I.

Jurisdiction.

Appellees first assert that because appellant proceeded to review his discharge by a law-suit, rather than by an administrative appeal to the Civil Service Commission, he cannot complain that the discharge violated his constitutional right to due process. This is essentially a claim that appellant failed to exhaust his administrative remedies.

It is not clear from the title to appellees' Point I or the discussion thereunder whether their challenge to this Court's jurisdiction is limited to the issue of *procedural* due process; their early motion to dismiss the appeal was

thus limited (Motion, pages 3-4). In any event, we believe that appellees' argument must be rejected for the following reasons:

(1) The appellees explicitly acquiesced in a direct review by the state courts of the constitutional issues arising from the application of the statute to appellant;

(2) Administrative proceedings are singularly inappropriate for the vindication of one's constitutional rights;

(3) Appellant had a right to accept the statutory warning, Security Risk Law, § 6, that an appeal to the Commission would result in an order not judicially-reviewable. See *Levitch v. Board of Education*, 243 N. Y. 373;

(4) The three courts below decided the federal constitutional issues raised by the appellant; they did not suggest that appellant had been derelict in failing to exercise administrative remedies;

(5) State courts are the final judges upon such matters as the exhaustion of administrative remedies and the proper method of raising federal questions.

We shall not repeat the argument on this subject set forth in our brief in opposition to the motion to dismiss the appeal herein (pp. 7-9). We supplement that discussion with the following reminder of what actually occurred in the state courts:

(1) In the State Supreme Court, the appellees did not take their present position that appellant should have appealed to the Civil Service Commission before seeking judicial review of the legality of his discharge. Instead, appellees asserted that a Civil Service Commission decision would not be subject to jurisdictional review. On the other hand, appellees conceded that direct court review of

appellees' action without intermediate Commission action was permissible with respect to constitutional issues (Appendix, A. p. 13).

For the convenience of the Court, we have set forth relevant excerpts on this point from appellees' brief in the State Supreme Court in Appendix A to this brief.¹

Further, in oral argument in the state Supreme Court, appellees expressed the desire to have the constitutional issues decided by that court, despite the absence of an appeal to the Civil Service Commission. The reason for this was quite clear: the principal issue in this case, as appears below, was the effect to be given to appellant's invocation of his constitutional privilege. That was not only a matter of law but of constitutional law and hence quite outside the domain of an administrative body such as the Commission.

This statement is corroborated by the character of the appellees' briefs in the two appellate courts below. In neither court did appellees argue that appellant's failure to appeal to the Commission justified judicial abstention. We note this earlier and consistent position of the appellees below not merely to indicate a waiver, but because it accorded with reality and was the reason for the full adjudication in the courts below of the principal constitutional issues raised by appellant.

Appellees' suggestion that the Commission reviewed two cases of employees of other state agencies is completely irrelevant. Neither of those cases involved a clear question of constitutional law, such as the right of employees to refuse to answer questions, (the principal issue posed by appellees) and the significance of the invocation of the constitutional privilege (the principal issue posed by appellant). In each of those cases, the employee involved an-

¹ Copies of this and other briefs filed by appellees in the state courts will be filed with the Clerk.

swered the questions put to him by his employer. The only issue remaining was whether their work was of a sensitive nature—an issue resolved by the Commission in favor of the employees.² As we have seen, that issue was directly resolved against appellant by the Court of Appeals in the instant case. The issue is, therefore, an appropriate one for review by this Court because it involves the constitutional rights of the appellant.

II.

The Confessed Cause of Appellant's Dismissal.

Appellees, quite understandably, seek to treat this case as one in which an employer unsuccessfully inquired of his employee with respect to matters relevant to the employment relationship, thus assimilating this case to that of *Garner v. Board of Public Works*, 341 U. S. 716. While we must respectfully indicate our disagreement with the majority opinion in that case, and are prepared, if necessary, to reargue the issue therein involved, we do not believe it necessary to do so because of the radical differences be-

² At the time of appellant's dismissal and throughout this litigation in the state courts, the Security Risk Law was construed by the Commission and by state agencies to mean that every position in a security agency was a security risk position regardless of the innocuous nature of the work (see *c.g.*, *Matter of New York City Housing Authority v. Falk*, S. Ct. N. Y. Co., N. Y. L. J. Jan. 10, 1958, Petition, par. 6). This was admitted by the Attorney General in his brief, pp. 6-7 in the state Supreme Court.

Following the criticism by the Governor's Committee noted in our principal brief, Appendix B, the Commission gave a new construction to the statute in the two cases cited by the Attorney General (Br. 9). In view of the settled administrative policy during the instant litigation, it is somewhat disingenuous for appellees to suggest a possible advantage to appellant of an administrative appeal. In any event, the Court of Appeals reached a conclusion with respect to appellant's work, making the issue ripe for review by this Court.

tween the disclosure statute involved therein and the evidentiary one which is the subject of the instant litigation.

Judge Fuld's dissenting opinion below shows the difference between the Security Risk Law of New York and the Charter and Ordinance involved in *Garner* (R. 67). It is enough, therefore, at this point, to show the Court that appellant was discharged because of the inferences drawn by appellees from his invocation of the Fifth Amendment—a fact clearly appearing in the record and in the briefs filed by the appellees in all the courts below.

The basis for the appellant's dismissal was a statute authorizing such sanctions upon "evidence" that "reasonable grounds exist for belief that because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation or of the state" (Br. 34).

The letter suspending appellant and reciting the charges against him stated that

"you refused to answer questions as to whether you were then a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the United States" (R. 10).

Appellees' briefs in all the courts below conceded that the invocation of the constitutional privilege against self-incrimination was the reason for discharge. It will be remembered that appellant's discharge took place in 1954, at a time when this Court's decisions on the significance of the Fifth Amendment had not as yet been rendered. (*Stachower v. Board of Higher Education*, 350 U. S. 551; *Ullmann v. United States*, 350 U. S. 422; *Emspak v. United States*, 349 U. S. 190.) There was, therefore, no reason for appellees to dissimulate. Thus, appellees' reply brief in the State Supreme Court stated:

"The test established by the Security Risk Law has been met in the instant case. Surely it cannot be

said that it is unreasonable to conclude that a man who refuses to reply on the ground of possible self-incrimination when asked point blank about membership in the Communist Party (not a political party but a subversive organization) is a proper person to have in a position in a security agency" (page 11).

Relevant excerpts from this and other briefs of appellees in the Courts below are set forth in Appendix "B" to this brief.

III.

The Nature of the Inquiry Before the City Commissioner of Investigation.

Appellees' present attempt to treat the Commissioner of Investigation as if he had been appellant's employer is equally understandable in the light of this Court's opinion in *Garner*. It is incorrect in view of the status and functions of the Commissioner of Investigation under the New York City Charter.

We do not challenge in this Court the Commissioner's right under state law, constitutional questions aside, to investigate appellees' employees. The Commissioner has broad powers "to make any study or investigation which, in his opinion, may be in the best interests of the City, . . ." (New York City Charter, § 803). The New York courts have upheld his power to examine persons who have no employment relationship with the state or city governments (*In re Wiener*, 183 Misc. 267).

Where the difference may determine constitutional rights, we do have the right to show that the investigation by the Commissioner of Investigation is of a different character than the inquiry made by Los Angeles of its own employees. See *Garner v. Los Angeles Board*, 341 U. S. 716.

In the present case the Commissioner of Investigation was not acting as an employer calling for relevant data from its employees. Appellant was an employee of a state agency, the New York City Transit Authority, and not of either the Commissioner of Investigation or his employer, the City of New York. The investigation was conducted at the request of the Mayor; the record contains no suggestion that it was conducted at the request of the New York City Transit Authority.

Until later developments in this litigation made it expedient, appellees did not treat the Commissioner of Investigation as their *alter ego*. The investigation was made, said appellees in the State Supreme Court, because the City was the lessor of the transit lines (not appellant's employer) and the investigation was therefore "in the best interests of the City." (Appellees' Reply Brief, p. 3.)³

Further, there is a meaningful difference between an employer's request for an affidavit as to an employee's political affiliations and the sweeping investigation by the Commissioner authorized by the City Charter. The Commissioner has inquisitorial powers in the technical sense; the range of his inquiries—supported by the judicial contempt power—is very wide. The employee who discloses his own organizational connections, thus having waived his

³ Appellees' brief in the State Supreme Court indicates that the Commissioner's investigation was initiated by him under the Charter, § 803, and not upon appellees' instructions (Br. p. 4). Appellees' original claim of a right to utilize the Commissioner's discoveries is very different from the present claim that he should be deemed appellant's employer. Appellees put it thus in the lowest state court: "It follows that, regardless of whether, because of the City's ownership of the Transit System, the Commissioner of Investigation had the power to initiate such an investigation as that which is here involved, the Authority certainly had the right to make use of his services for investigation under Section 1105 of the Unconsolidated Laws and to accept his report and any information received from him, as a basis for its action under said Section." (Appellees' Reply Br. p. 4.)

constitutional privilege, must also name his associates. An employer, unlike an investigating official with subpoena power, cannot compel his employee to become an informer. That is certainly another sound reason for not extending the *Garner* rule—assuming that it ought to be preserved—beyond the strict employment relationship under a statute requiring disclosure to one's own employer.

Appellees did not treat appellant's action before the Commissioner as a violation of his duty to make relevant disclosure to his employer. Instead, they treated appellant's reliance upon his constitutional privilege against self-incrimination as evidence of unreliability in the same way that they would have treated its assertion before a congressional committee. (Cf. *Slochower v. Board of Higher Education, supra*). Thus, appellees stated in the lowest court below:

It is submitted that under the Security Risk Law the Authority may consider and weigh evidence from any source, whether it be from the Commissioner of Investigation, the Police Department, the Federal Bureau of Investigation, or evidence of testimony before any legislative or Congressional Committee. There is no requirement of the law that the Authority is limited in its consideration to evidence developed as a result of its own investigation. Therefore, when the Commissioner of Investigation brought to the attention of the Authority the petitioner's recourse to the privilege against self-incrimination, the Authority was at liberty to consider and weigh this evidence, regardless of whether the Commissioner of Investigation was operating within his powers when the petitioner's testimony was given." (Br. pp. 7-8)

IV.

Appellees' Attempt to Distinguish Slochower.

Appellees attempt to distinguish *Slochower* upon the theory that this case has "none of the elements of automatic forfeiture present in the Slochower case" (Br. pp. 17-18). It is also said that appellees "gave careful consideration to the circumstances surrounding the asking of the question and the repeated refusal on the part of the employee to answer the question" (Br. p. 18).

There is little to be gained by an analysis of differences in factual detail between one case and another where the essential constitutional configuration is the same. Appellees' position and that of the Court of Appeals would make dismissal under the Security Risk Law equally automatic where an employee in a so-called security risk agency invoked his constitutional privilege with respect to Communist Party membership. In view of the unambiguous position taken both by appellees and the state courts, we do not understand appellees' reference to "the circumstances surrounding the asking of the question" (Br. p. 18).

Appellees' reference in this connection to the possible review by the Civil Service Commission is irrelevant in view of the definitive decision on this point by the highest state tribunal. It may be noted *en passant* that the Commission always upholds the dismissal of employees who have declined for any constitutional reason whatsoever to answer questions concerning membership in the Communist Party (See *e.g.* *Matter of Hehir v. New York City Transit Authority*, New York Sup. Ct., Kings Co., Index No. 4071 (1956); *Graham v. Falk* (S. D. N. Y., No. 130-51, pending)

V.

The Effect of the *Konigsberg* case.

Appellees seek to distinguish *Konigsberg v. State Bar of Calif.*, 353 U. S. 252 on two grounds: (1) the absence there of an employment relationship, and (2) appellant's alleged knowledge that his discharge would follow his refusal to answer.

The first point would disregard the point noted in our principal brief (p. 13), that the responsibility of members of the Bar is on an even higher level than that of a subway conductor in the civil service. The second point assumes a fact which is simply not true. The Security Risk Law, unlike the legislative enactments involved in *Garner*, contains no warning that the refusal to answer is a ground for discharge. The Commissioner of Investigation incorrectly advised appellant that he would be discharged for refusal to answer under § 903 of the New York City Charter (R. 7), an assertion inconsistent with the facts since appellant was not a city employee, and incorrect on the law, as ultimately announced by this Court in *Slochower*. The Commissioner did not state that appellant would be discharged under the Security Risk Law for invoking his constitutional privilege.

Appellees' notice of appellant's suspension merely recited the provisions of the Security Risk Law and appellant's assertion of the Fifth Amendment, and did not refer to his duties as an employee. The inference of disloyalty drawn here from invocation of the constitutional privilege is as improper as the inference of non-probity drawn in *Konigsberg* from refusal to answer based upon other constitutional rights.

VI.

The Right of Association.

In *Garner* this Court emphasized the fact that it was dealing with a disclosure statute and that it was not deciding whether discharge for membership in the Communist Party could be constitutionally sustained. Unless appellant prevails under the *Slochower* or *Konigsberg* doctrines, the right of a public employee to join a political organization must be adjudicated in the present case. For the discharge here is based and sustained in the Courts below, upon the assumption that behind the refusal to answer is possible membership in the proscribed organization, the Communist Party. Hence, the elaborate judicial delineations below of the nature of the Communist movement (R. 20, 31, 35, 52).

Therefore, it is relevant to consider the arguments made in Point IV of our principal brief with respect to this subject, and particularly to the absence of *scienter*.

Appellees make no claim that the Court below had interpolated *scienter* into the statute as was done by Maryland in *Gerende v. Election Board*, 341 U. S. 56. Appellees merely state negatively that the Court below "has not interpreted" the Security Risk Law in the manner found deficient in *Wieman v. Updegraff*, 344 U. S. 183. The failure of the Court of Appeals to do what the Maryland Court did in *Gerende*, the language of the New York Court of Appeals in its principal opinion in this case, and the language of the Security Risk Law, make it clear that *scienter* is not one of the elements of the statute. If it were, it would be an additional reason for refusing to infer guilty conduct from invocation of the Fifth Amendment.

The requirement of *scienter* in the Feinberg law—a radically different statute—(see our principal Brief, pp. 18-19)—does not justify the assumption that *scienter* is required by the Security Risk Law (Appellees' Brief, p. 18).

VII.

The Federal Privilege Against Self-Incrimination.

The appellees seem to have misunderstood our assertion of rights under the Fifth Amendment and under the privileges and immunities clause of the Fourteenth Amendment (Appellant's Brief, Point V, pp. 25-27).

We have some doubt as to whether the state may enter the federal domain by enacting a statute intending to aid the national defense—even though its effect is limited to state employees. But that problem need not be resolved, for if the state was constitutionally authorized to do so, it was acting to that extent as an agent of the federal government and hence subject to the latter's disabilities. The Commissioner's status as a city employee and presently claimed agent of the appellees does not negate this legal result: Appellant was therefore entitled to assert—as he did in terms—his federal constitutional privilege, without punishment by the state. His right to assert the federal privilege was an immunity, and privilege within the meaning of the Fourteenth Amendment.

Should the Court hold that the proceeding below was totally lacking in federal character imputed to it, appellant would then seek reconsideration of this Court's decision in *Adamson v. California*, 332 U. S. 46. We believe, however, that a decision favorable to appellant can be made upon the other grounds set forth above and that a review of the *Adamson* doctrine is unnecessary to decide this case.

Respectfully submitted,

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APPENDIX A

Appellees' Position in the State Supreme Court on the Respective Functions of the Court and Commission.

"So far we have argued that the Security Risk Law is constitutional and does not deprive petitioner of any of the constitutional guarantees relating to due process. If the law is constitutional, it is clear that any determination made and action taken thereunder by the Authority may not be examined into, reviewed or corrected by this Court in a proceeding under Article 78 of the Civil Practice Act. * * *

* * *

"While it is true that the cases are in conflict as to the right to maintain certiorari in advance of appealing to the State Commissioner of Education under Section 310 of the Education Law, it is submitted that the Court of Appeals has never passed upon the point. Moreover, the fact, that the Legislature spelled out in detail the provision relating to appeals under the Security Risk Law, as contrasted with the somewhat meager provisions of the Education Law, and provided that the decision of the Civil Service Commission should be final and conclusive and not subject to review in any court, clearly shows that the Legislature intended that appeal to the State Civil Service Commission should be the exclusive remedy under the Security Risk Law.

"It is quite apparent from a reading of the Security Risk Law as a whole, and from a careful consideration of the procedure which is set up therein, that the petitioner has no recourse to the courts unless it is solely for the purpose of seeking a judicial determination that the law itself is unconstitutional. If, however, the Security Risk Law is a valid exercise of the legislative power, then the petitioner's only remedy for review of the determination of the Authority is an appeal to the State Civil

Service Commission as provided in the law. Obviously, the legislative will would be thwarted were there to be a review of the findings of the employing agency by a court rather than by the State Civil Service Commission.

"In this connection, it is instructive to compare the appeal provision of the Security Risk Law (Section 1106) with that of the Civil Service Law (Civil Service Law, Section 22(c)). It will be noted immediately that the Civil Service Law gives the employee a right of election—that is, he may either take an appeal to the Municipal or State Commission, or he may bring an Article 78 proceeding. The fact that no election is given here shows a legislative intent that there should be no court review of determination made under the law" (Appellees' Brief in the State Supreme Court, pp. 19-23).

APPENDIX B

Appellees' Position Below on the Reasons for the Discharge of Appellant.

Appellees' Brief in the State Supreme Court

"That being the case, when the Commissioner of Investigation reported petitioner's refusal to answer the questions asked him upon a plea of immunity against self-incrimination, the Transit Authority had the right to consider this as evidence directly relating to petitioner's trust and reliability." (p. 7)

"The petition alleges that 'Assertion of a constitutional privilege cannot be grounds for discharge from employment.' This is a curious statement in light of the fact that Section 903 of the New York City Charter provides as follows:"

[Then follows the text of § 903 and quotations from *Daniman v. Board of Education*, 306 N. Y. 532 and the New York State Constitution, Article I, subdivision 6] (*Id.* at 24)

"Therefore, to exercise the discretion of removing the petitioner from his position, all that was required of the Authority was that it have reasonable grounds for belief that he was a member of the Communist Party. It did not have to have absolute proof of such membership, but merely reasonable grounds for belief with respect thereto. Certainly, the refusal of the petitioner to answer questions as to past or present membership in the Communist Party on the ground that his answers might incriminate him (not on the ground that his questioner had no power or right to examine him) was enough to afford reasonable grounds for belief that he was a Communist, even though it might not be positive proof thereof." (*Id.*, 26-27)

"It is highly significant that nowhere in petitioner's papers is there any allegation or even an intimation that petitioner is *not* a member of the Communist Party, nor is there any suggestion that had petitioner been examined under oath by the respondents, rather than by the Commissioner of Investigation, his answers would have been in any way different. It is respectfully submitted that it is the petitioner's duty, in maintaining a special proceeding such as this, to exhibit good faith to the court. If there is any disposition on the part of petitioner or his counsel seriously to contend that petitioner is not or was not a member of the Communist Party, certainly such a statement should appear somewhere in petitioner's papers. Without making such a statement, he is, in effect, asking the Court in this proceeding to order the respondents to take back into their employ in a security agency position a man who, in the light of what has occurred, there is reasonable ground to believe is a member of the Communist Party, and who, if this is so, is definitely a security risk. This certainly is asking the Court to assume a grave responsibility." (*Id.* at 29-30)

. . .

"It is therefore well established in the law of this state that the pleading of a constitutional privilege or a refusal to waive a constitutional privilege may be grounds for removal from public office or employment" (*Id.* p. 26)

. . .

Appellees' Reply Brief in State Supreme Court

"The test established by the Security Risk Law has been met in the instant case. Surely it cannot be said that it is unreasonable to conclude that a man who refuses to reply on the ground of possible self-incrimination when asked point blank about membership in the Communist Party (not a political party, but a subversive organization) is a proper person to have in a position in a security agency." (p. 11)

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JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. ~~1059~~ 165

In the Matter of the Application of

MAX LERNER,

Appellant,

For an Order Under Article 78 of the
Civil Practice Act,

against

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J.
KLEIN, HENRY K. NORTON, and DOUGLAS M.
MOFFAT, constituting the New York City Transit
Authority,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

MOTION TO DISMISS APPEAL

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INDEX

	PAGE
Statement of Case	1
POINT I—No substantial federal questions are presented	3
POINT II—In part, the federal questions sought to be raised were not timely or properly raised or expressly passed on by the courts below	6

Table of Cases

Adler v. Board of Education, 342 U. S. 485 (1952) ..	7
Dewey v. Des Moines, 173 U. S. 193 (1899)	8
Garner v. Board of Public Works, 341 U. S. 716 (1951)	4, 5
Konigsberg v. State Bar of California, 77 S. Ct. 722 (1957)	5
McGoldrick v. Compagnie Generale, 309 U. S. 430 (1940)	8
Slochower v. Board of Higher Education, 350 U. S. 551, rehearing denied, 351 U. S. 944 (1956)	5
Wilson v. Cook, 327 U. S. 474 (1946)	8

Statutes

Education Law, § 3022	7
New York Civil Practice Act, Article 78	7
New York Public Authorities Law, §§ 1200, et seq.	2
New York Security Risk Law, §§ 1101, et seq.	2, 4, 7

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The appellee, the New York City Transit Authority, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal on the grounds that (I) no substantial federal questions are presented and (II) that in part the federal questions sought to be raised were not timely or properly raised or expressly passed on by the courts below.

Statement of Case

The appellant was competitive civil service employee of the New York City Transit Authority, a public benefit corporation created under the laws of the State of New

York to operate the transit facilities owned by the City of New York (Public Authorities Law, § 1200, *et seq.*, McK. Cons. Laws, c. 43-A).

As shall be more fully demonstrated *infra*, this appellant was dismissed as a security risk pursuant to a state statute in a proceeding which met the standards of due process required by the Fourteenth Amendment to the United States Constitution. [Security Risk law, L. 1951, c. 233, as amended, McK. Unconsol. Laws, Title 3, c. 14 §§ 1101-1108.]

In the instant case, the appellant was called before the Commissioner of Investigation of the City of New York, who was acting for the appellant's employer, the New York City Transit Authority, as well as the City. Having been informed of the provisions of the state's Security Risk law, the appellant was asked whether he was then or had been a member of the Communist Party which organization, after due hearing, had been found by the state's Board of Regents to be dedicated to the advocacy of the violent overthrow of the government.

The appellant refused to answer the question as to current or past Communist Party membership on the ground that his answer would tend to incriminate him. He was given a number of opportunities to reconsider his answer as well as the opportunity to secure counsel. The appellant secured counsel, but persisted in his refusal to answer. Even after the appellant had been notified that, as a result of his refusal to answer, his employer had concluded he was a security risk, he was given an opportunity to come to his employer and attempt to reassure the Transit Authority that he was an employee to be trusted. This he did not do even though he knew his dismissal would follow.

Under the Security Risk law, the appellant had a right to go before the State Civil Service Commission and test in a hearing the soundness of the Transit Authority's

conclusion that he was a security risk. The appellant did not avail himself of this opportunity but instead directed a court challenge to the right of his employer to take any action against him under the Security Risk law for his refusal to answer when that refusal was based on his plea that an answer would tend to incriminate him.

The Court of Appeals of the State of New York held: (1) the New York City Transit Authority to be a "board, body or commission of the state or of any civil division thereof" within the meaning of the Security Risk law; (2) that the Transit Authority was properly designated a "security agency"; (3) that the Transit Authority was authorized by the Security Risk law to suspend and discharge the appellant from his position upon his refusal to answer whether he was, at the time he was questioned, a member of the Communist Party, although his refusal was allegedly based on his fear that an answer might tend to incriminate him; and (4) upheld the constitutionality of the New York State Security Risk law. In this Court the appellant is not challenging the first of these holdings.

I. No substantial federal questions are presented.

It is apparent from an examination of the points raised by the appellant in his Jurisdictional Statement that the gravamen of his appeal is the contention that his removal from his position pursuant to the Security Risk law deprived him of due process of law.

The provisions of the New York State Security Risk law, which include the requirement of notice and a hearing and the right to an administrative appeal, constitute a procedure which carefully protects the rights of public employees at all stages and are a complete answer to the appellant's contention that he was deprived of procedural due process under the Fourteenth Amendment to the United States Constitution.

The appellant deliberately rejected the procedural protection that the statute afforded to him. He had a statutory right to appeal from his employer's determination to the State Civil Service Commission where he would have received a full hearing. The Commission specifically had the power to "require amplification" of the reasons for the dismissal (Security Risk law, § 1106). Having elected to have recourse to the court before exhausting the procedural safeguards established by the Legislature of the State of New York for his protection, the appellant cannot now be heard to complain about an alleged lack of process when he did not avail himself of the procedure provided in the statute.

The appellant, in his brief urging this Court to accept jurisdiction of his appeal, repeatedly states that his dismissal was based on an improper inference of Communist Party membership drawn from his invocation of his constitutional privileges. The opinion of the Court of Appeals is clear that no such inference was drawn either by his employer in dismissing him or by the courts in sustaining the dismissal.

On the contrary, the Court of Appeals held that the appellant was, in fact, dismissed for refusing his employer vital and fundamental information. This Court has recognized that a municipal employer may inquire of its employees "as to matters that may prove relevant to their fitness and suitability for the public service." *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716, 720 (1950). The appellant, as a public employee, was under an affirmative duty to answer such pertinent questions as might be necessary to assure his employer, the Transit Authority, of his trust and reliability.

The Court of Appeals concluded that a refusal to answer, based on the ground of self-incrimination, should not put the appellant in a better position than the appellant

in the *Garner* case, *supra*, who had relied on an unexplained refusal, since, as between employer and employee, the duty to answer was the same in each case.

Mr. Justice Conway in his opinion for the court distinguished the instant case from *Slochower v. Board of Higher Education*, 350 U. S. 551, rehearing denied, 351 U. S. 944 (1956), pointing out that in the *Slochower* case this Court condemned the automatic dismissal of an employee who invoked the privilege against self-incrimination, without any opportunity for considering the circumstances surrounding the invocation in each case. In the instant case, the court noted: (1) That the question put to the appellant was whether he was then a member of the Communist Party; (2) The Transit Authority did not invoke any automatic dismissal but reached a conclusion stemming from the particular facts in the appellant's case with such conclusion subject to review; (3) This was a question put on behalf of the appellant's employer by an authorized agent seeking information vital to the security, in time of enemy attack on the City of New York, of the transportation system on which 6,000,000 people depend each day.

This case is obviously different from *Konigsberg v. State Bar of California*, 77 S. Ct. 722, in that in the case at bar both before the Commissioner of Investigation, and by virtue of the notification from the Transit Authority, the appellant was made to realize that a persistent refusal to answer questions with respect to his fitness for employment would inevitably result in the loss of his position: the appellant was an employee in a position which was important to the security of the people of the City of New York in the event of an enemy attack; the question as to Communist Party membership was based on the fact that after notice and hearing it had been listed as a subversive organization.

The argument of the appellant that his dismissal violates the federal constitutional provision guaranteeing equal

protection of the law is untenable in that he fails to cite any case where the Court of Appeals applied a different rule in a proceeding for the removal of a civil-service employee.

The appellant was removed from his position pursuant to a procedure established by a law enacted by the New York State Legislature. Despite the transparent attempt of the appellant to portray the City's Commissioner of Investigation as a federal agent (Jurisdictional Statement, p. 13), this was not in any sense a federal proceeding in which a plea of the Fifth Amendment would have been valid. Rather, the removal of the appellant was a purely local proceeding, and the opinion of the Court of Appeals upholding the propriety of such removal rests upon an adequate non-federal basis. For the foregoing reasons the appeal should be dismissed.

II. In part, the federal questions sought to be raised were not timely or properly raised or expressly passed on by the courts below.

The appellant urges in this Court for the first time that he was deprived of due process under the Fourteenth Amendment in that he claims he had no opportunity to challenge the designation of his position as a security position or the designation of the Transit Authority as a security agency or the designation of the Communist Party as a subversive organization. (See Jurisdictional Statement, p. 4, Questions 6 and 7.)

The appellant's entire "due process" argument as presented to the New York State courts (Brief to Court of Appeals, Point II, pp. 13-17) was confined to the claim that his dismissal was based on an alleged inference resulting solely from his invocation of constitutional privileges as a basis for his refusal to answer questions relating to present Communist Party membership.

Nowhere in his brief in the court below did appellant raise a constitutional objection either to the designation of his position as a security position or to the designation of the Authority as a security agency. As a matter of fact § 1103 of the Security Risk law provides that such determinations by the State Civil Service Commission shall be subject to review by the courts in accordance with the provisions of Article 78 of the Civil Practice Act.

The appellant likewise failed to raise any constitutional objection in the courts below to the manner of designating the Communist Party as a subversive organization.

The Jurisdictional Statement (p. 5) alleges that on March 24, 1954, the State Civil Service Commission designated the Communist Party as a subversive organization under the Security Risk law, adopting, without notice, hearing or evidence, the finding to that effect made by the New York State Board of Regents under the Feinberg Law (L. 1949, c. 360). Security Risk law, § 1108, specifically authorizes the State Civil Service Commission to adopt designations of organizations as subversive groups made by the State Board of Regents pursuant to § 3022 of the Education Law (McK. Con. Laws, c. 16), provided such designation was made after due notice to such organization and an opportunity afforded to it to answer. The right of the State Board of Regents to make such designations after notice and hearing was upheld by this Court in *Adler v. Board of Education of the City of New York*, 242 U. S. 85 (1952).

The petitioner, had he appealed to the State Civil Service Commission, could have challenged the application to him of the finding that the Communist Party is a subversive organization, and, had he been unsuccessful, he might have secured a court review within four months of such application pursuant to the provisions of Article 78 of the New York State Civil Practice Act.

It is well settled that an appellant is not entitled to raise in this Court claimed violations of constitutionally guaranteed rights not presented to the State courts. *Dewey v. Des Moines*, 173 U. S. 193 (1899); *Wilson v. Cook*, 327 U. S. 474 (1946); *McGoldrick v. Compagnie Generale*, 309 U. S. 430 (1940).

Wherefore, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the courts of the State of New York herein be affirmed.

Dated: Brooklyn, N. Y., July 1, 1957.

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Attorney for Appellees.

DANIEL T. SCANNELL,
HELEN R. CASSIDY,
EDWARD L. COX, JR.,
of Counsel.

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JUL 22 1957

JOHN T. PEY, Clerk

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Appellees,

**ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.**

**BRIEF IN OPPOSITION TO MOTION
TO DISMISS APPEAL**

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INDEX

	PAGE
POINT I.....	1
POINT II.....	3
POINT III.....	7
POINT IV.....	9
CONCLUSION	12

Table of Cases

Black v. Cutter Laboratories, 43 Cal. 2d 788, writ dismissed, 351 U. S. 292.....	6
Board of Public Education, School District of Philadelphia v. Herman Beilan, No. 668, Oct. Term, 1956	5
Citron v. O'Shea, Matter of, 244 App. Div. 158.....	9
Cottrell v. Board of Education, 181 Misc. 645, affirmed 267 App. Div. 817, affirmed 293 N. Y. 792, 50 N. E. 2d 32.....	8
Dewey v. City of Des Moines, 173 U. S. 193, 198..	3
Hehir v. The New York City Transit Authority, N. Y. Sup. Ct., Kings Cty., Index No. 4071, 1956	6, 7, 8
Konigsberg v. California, 77 S. Ct. 722.....	4, 5, 6
O'Connor v. Emerson, Matter of, 196 App. Div. 807, affirmed 232 N. Y. 561, 134 N. E. 572.....	8, 9
Parker v. Illinois, 333 U. S. 571.....	7
Schware v. Board of Examiners, 77 S. Ct. 752.....	6
Slochow v. Board of Higher Education, 350 U. S. 551, rehearing denied, 351 U. S. 944.....	4, 6
Wieman v. Updegraff, 344 U. S. 183.....	6

Constitution, Statutes and Regulations

	PAGE
United States Constitution:	
Fifth Amendment	2
Fourteenth Amendment	2, 3
Constitution of State of New York:	
Article I, § 6	2, 3
Security Risk Law, N. Y. Laws 1951, c. 233	3, 8

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The appellees have moved to dismiss the appeal herein upon two grounds: (1) absence of a substantial federal question, and (2) failure *in part* to raise the federal questions in the courts below.

I.

Appellees are in error on both points. This appears from the majority and dissenting opinions in the two appellate courts below. It will be shown further by refer-

ences to the record and to appellant's briefs. Finally, a motion to dismiss an appeal does not lie unless *no* substantial federal issues were presented below.

For the convenience of the Court, we set forth at this point the federal questions recited in the Notice of Appeal:

1. Whether the dismissal from public employment of a subway conductor with tenure contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States where such dismissal is upon the ground that he is a security risk, the sole evidence thereof being his invocation of his constitutional privilege against self-incrimination.

2. Whether the dismissal of the said employee for "Activities . . . which give reasonable ground for belief that he is not a good security risk," contravenes the due process clause of the Fourteenth Amendment, where he was never served with charges of such activities, there was no hearing, and he has never been informed of the nature of the activities.

3. Whether the discharge of a subway conductor for membership in the Communist Party violates his right to freedom of speech, assembly and association under the Fourteenth Amendment to the Constitution of the United States when such membership is at most inferred from his invocation of the constitutional privilege and scienter is not charged.

4. Whether the appellant's privilege against self-incrimination under the Fifth Amendment to the United States Constitution and his immunities and privileges under the Fourteenth Amendment thereto were abridged by his dismissal from public employment because he had asserted his constitutional privilege in a proceeding conducted by state authorities in pursuance of the federal government's security program.

5. Whether the state court's interpretation and application herein of the privilege against self-incrimination under the State Constitution, Article I,

§ 6, is not so restrictive and inconsistent with that court's liberal construction and application of the privilege in cases involving public officials, members of the bar and other persons as to deny the appellant the equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

6. Whether the determination that appellant's work was "necessary to the security and defense of the nation and the state" was in violation of his right to due process under the Fourteenth Amendment when the making of such determination was without notice to appellant and without evidence or hearing, and, further, was arbitrary and unreasonable in view of the nature of his duties.

7. Whether the appellant has not been denied due process under the Fourteenth Amendment to the United States Constitution when he was discharged from employment as a subway conductor by the New York City Transit Authority upon the basis of findings, *inter alia*, that the Communist Party was a "subversive organization" and that the New York City Transit Authority was a "security agency" within the meaning of the Security Risk Law, N. Y. Laws 1951, c. 233 as amended, when he was not a party to any proceeding making such findings and was not afforded, under the said statute, any opportunity to challenge such findings.

It will be shown below that each raises a substantial question, that the first six such points were squarely raised and decided in the state courts and the last one necessarily comprehended within the due process claims asserted by appellant and decided adversely to him by the state courts. (See *Dewey v. City of Des Moines*, 173 U. S. 193, 198).

II.

The basic issue presented by this appeal is whether appellant's dismissal upon the ground that he is a security risk contravenes the due process clause of the Fourteenth Amendment where the sole evidence against him was his

invocation of the constitutional privilege. This issue was squarely raised and passed upon in all the three state courts (fols.¹ 40, 45, 47; 79-41, 148-228; Juris. State,² App.³ p. 25).

One judge in the Appellate Division and two judges in the Court of Appeals agreed with appellant that he had been denied such due process (fols. 215, 227, Juris. State. pp. 41, 43-44, 48). This view has since been confirmed by this Court's decision in *Konigsberg v. California*, 77 S. Ct. 722, 732, where it said:

"The State argues that Konigsberg's refusal to tell the Examiners whether he was a member of the Communist Party or whether he had associated with persons who were members of that party or groups which were allegedly Communist dominated tends to support an inference that he is a member of the Communist Party and therefore a person of bad moral character. We find it unnecessary to decide if Konigsberg's constitutional objections to the Committee's questions were well founded. Prior decisions by this Court indicate that his claim that the questions were improper was not frivolous and we find nothing in the record which indicates that his position was not taken in good faith. Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or his moral character in general if his refusal to answer was based on a belief that the United States Constitution prohibited the type of inquiries which the Committee was making. On the record before us, it is our judgment that the inferences of bad moral character which the Committee attempted to draw from Konigsberg's refusal to answer questions about his political affiliations and opinions are unwarranted."

citing *Slochower v. Board of Higher Education*, 350 U. S. 551, rehearing denied, 351 U. S. 944, and other cases in-

¹ "fols." refer to the certified transcript of Record filed with this Court when the case was docketed.

² "Juris. State." refers to the Jurisdictional Statement.

³ "App." refers to the Appendix to the Jurisdictional Statement.

volving the constitutional privilege against self-incrimination.

This Court's recent grant of certiorari in *Board of Public Education, School District of Philadelphia v. Herman Beilan*, No. 668, Oct. Term, 1956, requires the denial of the appellees' motion herein. Beilan was discharged for refusing to answer his employer's questions as to membership in the Communist Political Association. He asserted that the employer was required to produce evidence of wrongdoing under the Pennsylvania Loyalty Act. The Board of Public Education, in opposing certiorari, argued in this Court that Beilan was discharged not for disloyalty but for refusal to carry out his duty to answer questions pertinent to his duties (Brief for Respondent in Opposition, p. 6). The due process issue herein is the same as in *Beilan*. The discretionary grant of certiorari in *Beilan* makes it clear that a substantial federal question is raised herein.

Appellees seek to distinguish this Court's decision in the *Konigsberg* case on three grounds: (1) that appellant was warned of the consequences of his refusal; (2) that his work as a subway conductor was important to national security and (3) that the Communist Party had been "listed as a subversive organization" (Motion,⁴ p. 5).

The first ground is relevant to only one part of the *Konigsberg* decision. It has no bearing upon the second principle set forth in that case: the irrationality under the due process clause of an inference of wrongdoing or bad character from a refusal to answer (77 S. Ct. at 732). Appellees inaccurately assert that no such inference was drawn below (Motion, p. 4). On the contrary, appellant could only be discharged under the statute if his refusal to answer was evidence of unreliability (Security Risk Law, App., pp. 17-24). Such a finding was made by appellees

⁴ "Motion" refers to appellees' motion to dismiss the appeal, to which this brief is addressed.

(fols. 50-51, 65) and by the Courts below (fols. 109, 115, 169, 199, 209, App., pp. 35-36).

The second and third distinctions urged by appellees are irrelevant to the due process issue. Surely a higher degree of probity is not required of a subway conductor with tenure than of an applicant for admission to the Bar. Nor are California's views with respect to the Communist Party different from those of New York. (See *e.g.*, *Black v. Cutler Laboratories*, 43 Cal. 2d 788, writ dismissed, 351 U. S. 292.) Finally, New York in its treatment of appellant was as indifferent to the *scienter* doctrine of *Wieman v. Updegraff*, 344 U. S. 183, as was New Mexico in *Schwartz v. Board of Examiners*, 77 S. Ct. 752, and California in the *Konigsberg* case.

Three judges in the courts below were of the opinion that this Court's decision in *Slochower v. Board of Education*, 350 U. S. 551, required a decision in favor of appellant. The appellees seek to distinguish *Slochower* on these grounds: (1) that the inquiry here was as to present as well as past membership; (2) that the discharge was not automatic because appellees "reached a conclusion stemming from the particular facts . . ." and (3) that the Commissioner of Investigation before whom the privilege was asserted was "an authorized agent" of appellees (Motion, p. 5).

Noting these points *seriatim*: First, this Court's remark in *Slochower* concerning present membership was incidental to the principal theme of the case. This view is corroborated by the *Konigsberg* decision, which did involve a refusal to discuss present membership. Second, the discharge here was in fact "automatic" as indicated by: (1) the unequivocal finding herein of unreliability by reason of the assertion of privilege; (2) appellees' consistent record of discharging employees under the Security Risk Law for refusing to answer political questions (see, also, *Hehir v. The New York City Transit Authority*

(N. Y. Sup. Ct., Kings 'Cty., Index No. 4071, 1956), still pending) regardless of the period covered by the employee's refusal to testify. Finally appellant does not concede that the Commissioner was appellees' agent; this point, however, is not material to the due process issue.

III.

Appellees argue next that appellant's failure to appeal to the State Civil Service Commission before instituting this law-suit eliminates any substantial federal question as to *procedural* due process (Motion, pp. 3-4).

This argument is limited to the procedural due process questions set forth in the Notice of Appeal, Questions 2, 6 and 7. It has no bearing upon: Questions 1 (substantive due process); 3 (freedom of speech, assembly, and political association); 4 (federal self-incrimination and immunities and privileges), or 5 (equal protection).

The argument is without merit with respect to the various aspects of procedural due process represented by Questions 2, 6 and 7. The proper method of raising federal questions is a matter of state practice. *Parker v. Illinois*, 333 U. S. 571. The New York courts have resolved these issues in favor of appellant.

Thus, the lowest court expressly held that appellant was not required to appeal to the Civil Service Commission in his attack upon the constitutionality of state statute as written or applied (fol. 122). It said:

" * * * Indeed, section 1106 expressly provides that 'the decision of the Commission shall be final and conclusive and not subject to review by any court.' So, to be consistent, the fact of validity of the statute would ordinarily require the petitioner to complete his statutory remedy by appealing to that body (*People ex rel. Walrath v. O'Brien*, 112 App. Div., 97). But the grounds for review do include the heretofore undetermined question of constitution-

ality of the statute whose sanctions are applied against the petitioner. In the absence of decisional law as to its constitutionality, he is justified in addressing himself to the court despite its provisions for final and conclusive determination by the State Civil Service Commission."

An appeal to the Civil Service Commission was unnecessary and meaningless.⁵ There was no dispute with respect to the critical fact—the assertion of the privilege. The Commission was not competent to adjudicate the constitutional problems raised by the appellant. Further, the Commission's designation of the Transit Authority as a security agency was made without hearing (see App. 43, fn. 2); and in no proceedings before it under the Security Risk Law has it ever seen fit to reopen the issue or to justify the designation by evidence (see, e.g., *Hehir* case, *supra*).

It would have been equally futile to seek to litigate before the Commission the issue of whether the Communist Party is a subversive organization. For the Commission, acting under Section 8 of the statute, adopts designations made by the State Board of Regents. That Board designated the Communist Party as subversive. Further, the Court of Appeals made its own evaluation of the Communist Party by a process analogous to judicial notice (App. 37-38).

Under New York practice litigants are frequently given a choice by the courts, even in the absence of statutory provision and even in matters not involving constitutional issues—of choosing between an appeal to an administrative body and a suit in the courts. *Cottrell v. Board of Education*, 181 Misc. 645, affirmed 267 App. Div. 817, affirmed 293 N. Y. 792, 59 N. E. 2d 32; *Matter of O'Connor v. Emer-*

⁵ It might even have jeopardized appellant's rights, since the statutory method makes Commission action "final and conclusive and * * * not subject to review in any court" (§ 6, App. 22).

son, 196 App. Div. 807, affirmed 232 N. Y. 561, 134 N. E. 572; *Matter of Citron v. O'Shea*, 244 App. Div. 158.

The opinion of the Court of Appeals makes no critical reference to appellant's choice of the judicial, rather than the administrative forum (App., pp. 25-41). The Court did not decline to adjudicate any of the issues raised by reason of this choice. Therefore, appellees may not ask this Court to decide differently this purely procedural aspect of State law.

IV.

Appellees argue finally that appellant's questions 6 and 7 were not presented to the courts below (Motion, p. 6). Since appellees by this limited attack concede that questions 1 through 5 were presented to the state courts, the failure—if failure there was—to present two other questions would not justify the present motion. At most, it might persuade this Court after hearing the appeal to decline adjudication upon the issues not directly presented to the state courts.

However, appellees are incorrect on the facts and their single reference to appellant's principal brief in the Court of Appeals is incomplete (Motion, p. 6). In Questions 6 and 7, appellant asserts that he was denied due process by three determinations below that (a) his work involved national security, (b) the Transit Authority was a security agency and (c) the Communist Party was a subversive organization, because he was not a party to the proceedings in which such determinations were made. Appellant also challenges as arbitrary and unreasonable the said designation of his work as involving national security.

These contentions are sufficiently comprehended by appellant's claims in the three courts below and by the three decisions holding that appellant was not denied procedural due process. Thus appellant's first pleading, his petition in the State Supreme Court, asserted that "the

Security Risk Law is unconstitutional in that as written and as applied it is inconsistent with procedural due process" (fol. 45); this claim was explicitly decided against him by the lowest state court (fols. 99-100).

In the Court of Appeals, appellant's second point in his principal brief raised substantive and procedural due process claims under the following heading:

POINT II

"THE STATUTE AS CONSTRUED AND APPLIED VIOLATES APPELLANT'S RIGHT TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS BECAUSE HE WAS DISCHARGED FOR INVOCATION OF HIS CONSTITUTIONAL PRIVILEGE RATHER THAN UPON CHARGES AND EVIDENCE OF WRONGDOING." (Brief, p. 13).

More specifically, appellant stated *inter alia*:

"Appellant was obviously not given a fair trial, that is, one which would meet the procedural requirements of due process. These include: reasonable notice of the discharges, *In re Oliver*, 333 U. S. 257; *United States v. Cruikshank*, 92 U. S. 542, 558; the right to a hearing, *Shields v. Utah Idaho R. Co.*, 305 U. S. 177; *Morgan v. United States*, 304 U. S. 1; *Palko v. Connecticut*, 302 U. S. 319, 327; an opportunity to examine the evidence and to cross-examine witnesses supporting the charges, to offer testimony on one's own behalf, and to be represented by counsel, *In re Oliver*, *supra*; *Motes v. United States*, 178 U. S. 458, 467, 471; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 93" (Brief, pp. 16, 17).

Copies of appellant's principal and reply briefs in the New York Court of Appeals have been filed with this Court.

Appellant also argued in his third point that

POINT III

"A DISCHARGE FOR POLITICAL REASONS, IF IT CAN BE JUSTIFIED AT ALL, IS CONSTITUTIONAL ONLY IN THE EVENT OF A SERIOUS EMERGENCY REQUIRING SUCH ACTION. SUCH AN EMERGENCY DOES NOT EXIST HERE." (Brief, p. 18.)

Appellant pointed out *inter alia* that the Security Risk Law does not require *scienter* and that it

"does not even require the Commission to base its findings upon evidence developed in hearings conducted by it but permits the incorporation of 'findings' made by other agencies, state and federal (§ 1108)" (Brief, p. 18).

Appellant likewise challenged the claim that he was in "a sensitive position" (Brief, p. 21) and added:

"Nevertheless, the State Civil Service Commission, *without any hearing known to appellant*, defined the Transit Authority as a security agency, thereby subjecting to the Security Risk Law every employee in that agency regardless of the nature of his duties" (italics added) (Brief, p. 21).

The Court of Appeals decided Question 6 by holding as a matter of law:

"The Transit Authority performs a function necessary to the security or defense of the nation and state" (App., p. 33).

The Court of Appeals also ruled upon appellant's claim that the designation without hearing of the Transit Authority as a security agency was improper (Question 6). It said that "the Transit Authority has been properly designated a 'security agency'" (App., p. 34). It expressly declared "untenable" appellant's claim that "no emergency could conceivably justify the dismissal of the petition because his position as a conductor could have no national connection with national security" (App., p. 37).

The only procedural due process issue posed by appellant upon which the Court of Appeals did not rule was the claim that the designation of the Communist Party was not made in a proceeding to which appellant was a party. Appellant had raised this issue in the Court of Appeals by pointing out that the statute authorizes the Commission to make such designations without any hearings (Brief, p. 5).

The failure of the Court of Appeals to rule expressly upon this particular aspect of the due process issue cannot prejudice appellant. In any event, this facet of the case, while important, is incidental to the main ones discussed above and directly ruled upon by the Court of Appeals.

CONCLUSION

Appellees' motion to dismiss the appeal or affirm the judgment and decrees of the New York courts should be denied.

Dated: New York, N. Y., July 17, 1957.

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JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 165

In the Matter of the Application of
MAX LERNER,

Appellant,

For an Order Under Article 78 of the
Civil Practice Act,

against

**HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J.
KLEIN, HENRY K. NORTON, and DOUGLAS M.
MOFFAT, constituting the New York City Transit
Authority,**

Appellees.

**ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK**

APPELLEES' BRIEF

February 24, 1958.

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EDWARD L. COX, JR.,
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INDEX

	PAGE
Jurisdiction	1
Questions Presented	2
Statement of the Case	3
Summary of Argument	8
POINT I—The appellant having failed to avail himself of the statutory review cannot complain of lack of due process, and this Court should refuse jurisdiction	9
POINT II—The refusal of a public employee to assure his employer that he was not then and had not been a member of the Communist Party, justifies the employer's conclusion that the employee is of doubtful trust and reliability	15
Conclusion	25
Appendix A	26
Appendix B	27

Table of Cases

Adler v. Board of Education, 342 U. S. 485 (1952) ...	15, 18
Bradley v. Richmond, 227 U. S. 477 (1912)	11
Canteline v. McClellan, 282 N. Y. 166 (1940)	13
Chaplinsky v. New Hampshire, 315 U. S. 568 (1941)	21
Christal v. San Francisco, 33 Cal. App. 564; 92 P. 2d 416 (1939)	24
Cole v. Young, 351 U. S. 536 (1956)	22
Dennis v. United States, 341 U. S. 494 (1951)	20, 21
Doyle, Matter of, 257 N. Y. 244 (1931)	13
Feiner v. New York, 341 U. S. 315 (1951)	21
Garner v. Board of Public Works, 341 U. S. 716 (1951)	12, 15, 16, 23
Grae, In re, 282 N. Y. 728 (1940)	13

	PAGE
Guardian Life Insurance Co., Matter of, v. Bohlinger, 308 N. Y. 605 (1955)	12
Gundling v. Chicago, 177 U. S. 183 (1900)	11
Jacobs v. Falk, 139 N. Y. L. J. 5, January 10, 1958	11
Kaffenburgh, Matter of, 188 N. Y. 49 (1907)	13
Konigsberg v. State Bar of California, 353 U. S. 252 (1957)	19
N. Y. C. Housing Authority, Matter of, v. Falk, 139 N. Y. L. J. 5, January 10, 1958	10
People v. Doyle, 1 N. Y. 2d 732 (1956)	13
People v. Harris, 294 N. Y. 424 (1945)	13
People ex rel. Lieberman v. Van DeCarr, 199 U. S. 552 (1905)	11
People ex rel. Taylor v. Forbes, 143 N. Y. 219 (1907)	13
Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531 (1913)	11
Prince v. Massachusetts, 321 U. S. 158 (1944)	21
Ross, Matter of, v. Wilson, 308 N. Y. 605 (1955) ..	12
Sheiner v. Florida, 82 So. 2d 657 (1955)	14
Slochower v. Board of Higher Education, 350 U. S. 551, rehearing denied 351 U. S. 944 (1956)	16, 17
Ullmann v. United States, 350 U. S. 422 (1956)	21
United Public Workers v. Mitchell, 330 U. S. 75 (1947)	12
U. S. ex rel. Belfrage v. Shaughnessy, 212 Fed. 2d 128 (1954)	19
Wieman v. Updegraff, 344 U. S. 183 (1952)	16

Constitutional Provisions and Statutes

Constitution of the United States:

Fifth Amendment	5, 6, 19
Ninth Amendment	13
Tenth Amendment	13
Fourteenth Amendment	13

Federal Statutes:

5 U. S. C. 22-1	22
28 U. S. C. 1257(2)	1

Constitution of the State of New York:

Article 4 , Section 6	13
Article V, Section 6	9

New York Statutes:**Civil Practice Act**

Article 78, § 1283 et seq.	4, 7
---------------------------------	------

Civil Service Law

Section 3	9
Section 6	9
Section 11, subd. 2	20

Education Law

Section 3022 (Feinberg Law)	15
-----------------------------------	----

Public Authorities Law

Section 1200 et seq.	3
---------------------------	---

Security Risk Law	1, 2, 3, 4, 5, 7, 9, 11, 12, 18, 24
-------------------------	-------------------------------------

New York City Charter:

Section 803	14
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ing the New York City Transit Authority,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK —

APPELLEES' BRIEF

Jurisdiction

The appellant has invoked the jurisdiction of this Court under Title 28, U. S. C., § 1257(2). The appellees submit that no substantial question under the Constitution or laws of the United States was raised by the dismissal of this public employee pursuant to the Security Risk Law of the State of New York (L. 1951, c. 233, as amended). As shall be demonstrated *infra*, the dismissal of the appellant, based

upon his refusal to answer proper questions put to him for his public employer and related to his loyalty, was based upon adequate non-federal grounds. The fact that the appellant failed to avail himself of the process provided by the statute, i.e., the right to a full administrative review, precludes his invoking the jurisdiction of the federal courts in an area of state activity.

This Court has postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 103).

Questions Presented

1. Whether this Court should take jurisdiction of the appeal by reason of the failure of the appellant to avail himself of his right to administrative review of his dismissal from his civil service position, by an appeal to the State Civil Service Commission, wherein all of the allegations of violations of his constitutional rights could have been raised (N. Y. State Security Risk Law, L. 1951, c. 233, § 6; McK. Unconsol. Laws § 1106).

2. Whether a public employer may, after due consideration, dismiss a civil service employee who refuses to answer questions as to present Communist Party membership duly put to him on behalf of his employer, upon the ground that such refusal constitutes reasonable grounds for the belief that the employee is of doubtful trust and reliability within the meaning of a state statute enacted for the protection of the security of the nation and the state (L. 1951, c. 233).

Statement of the Case

The New York City Transit Authority (hereinafter called the "Authority") is a body corporate and politic constituting a public benefit corporation (Public Authorities Law, § 1201, Cons. Laws, ch. 43-A). The Authority was created by the State Legislature to operate the city-owned rapid transit railroad lines, omnibus lines, power plants and other instrumentalities used in connection therewith, previously under the jurisdiction of the Board of Transportation of the City of New York. It is the Authority's statutory duty to operate these facilities for the convenience and safety of the public, which purposes are declared to be in all respects for the benefit of the people of the State of New York. In carrying out such purposes, the Authority is declared to be performing a governmental function (Public Authorities Law, § 1202).

All of the Authority's employees are public employees in the classified civil service whose appointment, promotion and continuance in employment are governed by the provisions of the Civil Service Law of the State of New York and the rules of the City Civil Service Commission (Public Authorities Law, § 1210).

The appellant was employed by the Authority as a conductor on the IND Division of the subway system (R. 10). In Appendix A of this brief will be found the pertinent provisions of notice of examination for promotion to conductor, issued by the City Civil Service Commission; in Appendix B will be found excerpts from Rules and Regulations adopted and promulgated by the Authority, pursuant to Public Authorities Law, § 1204, in so far as they relate to the duties of conductor. From these it appears that a conductor has emergency responsibilities as well as routine duties. As a uniformed employee he has general access to the operating areas of the transit system, not open to the public at large.

The New York State Security Risk Law was based upon a specific legislative finding—first, that by reason of the armed aggression in Korea and the proclamation by the President of a national emergency, there existed a serious public emergency in the State of New York, and second, a more general finding, that the employment of members of subversive groups and organizations presented a grave peril to the state and national security. The Legislature concluded that it was vital and essential that measures be taken to effect the suspension and removal from security positions of persons in governmental service concerning whom reasonable grounds exist for the belief that because of doubtful trust and reliability their employment in such positions would endanger the security or defense of the nation and the state (Security Risk Law, L. 1951, c. 233, § 1). From the enactment of the law to date the New York State Legislature has recognized the continued dangerous world situation and has renewed the Security Risk Law each year up to and including the current legislative session.

The statute provides that the State Civil Service Commission shall determine whether an agency is a security agency within the meaning of the law, thereby bringing all of the employees of such agency within its purview, or whether only certain positions within an agency are security positions. Effective November 23, 1953, the State Civil Service Commission, after making appropriate inquiries, and as an administrative determination, duly designated the Authority as a security agency (see letter referred to in footnote 6, page 24 of appellant's brief). There has been no challenge to this designation, although section 3 of the law provides a review by the courts of New York State in a proceeding under Article 78 of the Civil Practice Act.

Section 5 of the Security Risk Law permits a public body, such as the Authority, to suspend an employee occu-

pying a security position or a position in a security agency whenever it shall find, after proper investigation and inquiry, that upon all the evidence, reasonable grounds exist for belief that because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state. Within the framework of the law any person thus suspended is permitted an opportunity, within thirty days after notification, to submit statements or affidavits to show why he should be reinstated or restored to duty.

On September 14, 1954, the appellant, pursuant to instructions from his immediate superior in Authority service, appeared at the office of the Commissioner of Investigation of the City of New York. Appellant was advised that he was there for the purpose of answering questions in an investigation being conducted by that office (R. 11). After being sworn, appellant refused to answer questions as to whether he was then a member of the Communist Party, and invoked the privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States (R. 15). He was advised of the provisions of the Security Risk Law and was given an opportunity to reconsider his refusal. Appellant reappeared at the office of the Department of Investigation on September 21, 1954, at which time he requested, and was granted, an additional postponement to engage counsel. On September 30, 1954, appellant appeared accompanied by counsel who requested, and was granted, a further adjournment. On October 8, 1954, appellant again appeared with counsel, and again refused to answer questions as to whether he was then, or had been, a member of the Communist Party, and again invoked the Fifth Amendment to the Constitution of the United States (R. 15-16). The power of the Commissioner of Investigation to conduct this inquiry on behalf of the City of New York and the Authority, was expressly upheld by the Court of Appeals (R. 80-81).

The Commissioner of Investigation submitted a report to the Authority setting forth the relevant facts (R. 16), with the result that on October 21, 1954, by formal resolution, appellant was suspended without pay (R. 16-18). The resolution of suspension specifically set forth the fact that the appellant had refused to answer questions regarding present and past membership in the Communist Party in testifying under oath before the Department of Investigation of the City of New York on certain specified dates, and that he had on such occasions invoked the privilege set forth in the Fifth Amendment of the Constitution of the United States. The resolution also contained a finding by the Authority, pursuant to § 5 of the statute, that upon all the evidence, reasonable grounds existed for the belief that because of his doubtful trust and reliability, the continued employment of the appellant would endanger the security of defense of the nation and the state (R. 17).

This resolution was sent to the appellant with a covering letter signed by the Executive Director and General Manager of the Authority, which also recited in detail the reasons for the action taken (R. 15-16). Both the letter and the resolution clearly notified appellant that he had the opportunity, within thirty days, to submit statements or affidavits to show why he should be reinstated or restored to duty (R. 16-17). The resolution ordered the Executive Director and General Manager to conduct such further investigation and review as might be necessary in the circumstances, and to report to the Authority at the expiration of thirty days from the date of notification to the appellant (R. 18).

During the thirty-day period following the notification to the appellant, neither he nor any person upon his behalf, communicated with either his employer, the Authority, or with the Commissioner of Investigation of the City of New York (R. 19). Accordingly, by report dated November 22, 1954, the Executive Director and General Manager

notified the Authority that the thirty-day period had elapsed without any word whatsoever from the appellant, and that further investigation had revealed activities on the part of the appellant which also gave reasonable grounds for belief that he was not a good security risk, and recommended that his employment be terminated (R. 21). The Authority then found, upon review, that upon all the evidence reasonable grounds existed for the belief that because of his doubtful trust and reliability, the employment of appellant endangered the security or defense of the nation and the state, and directed that his employment be terminated effective at the close of business on November 24, 1954 (R. 21).

At this point the appellant had available to him under the provisions of the Security Risk Law an appeal to the State Civil Service Commission. The appellant did not avail himself of the right to administrative review in the course of which, as will be demonstrated *infra*, the State Civil Service Commission could have required the Authority, at a hearing or by other means, to amplify its reasons for the action taken. The appellant could have challenged the designation of his position as a security position, the designation of the Authority as a security agency, and the listing of the Communist Party as a subversive organization. Instead he commenced this proceeding under Article 78 of the New York State Civil Practice Act by the service of a notice of motion, verified petition and exhibits on or about December 10, 1954 (R. 1). The respondents counter moved to dismiss (R. 23).

Summary of Argument

This Court should refuse to take jurisdiction of this appeal because the appellant failed to avail himself of the right to appeal his dismissal to the State Civil Service Commission where he could have had a complete review of his employer's determination. He might have contended that, as a conductor, he was not occupying a security position, and he might also have challenged the designation of the Communist Party as a subversive organization. It cannot be assumed that upon such a hearing the members of the State Civil Service Commission, as responsible public officers, would have deprived appellant of any of the elements of due process.

The State of New York has a right to pass laws dealing with the removal of subversive persons from public employment. It may also provide for the removal of persons concerning whom their public employer has reasonable grounds to believe that because of doubtful trust and reliability, their employment in security positions would endanger the security or defense of the nation and the state.

The appellant, by refusing to answer questions relevant to his loyalty, which the Commissioner of Investigation put to him on behalf of his employer, breached that bond of confidence which must exist between public employer and employee. Therefore the Authority properly set in motion the procedure under the Security Risk Law for the removal of this employee for doubtful trust and reliability. As required by the law, the appellant was given thirty days within which to satisfy his employer that he should be reinstated or restored to duty. Since the employee, even though he knew that his civil service position was at stake, offered no explanation to his employer during this period, the Authority was justified in terminating his employment.

The Authority, as a public employer, had the right to look to its employee in the first instance for reassurance as to his trust and loyalty. The appellant had a corresponding duty to so reassure his employer; this he failed to do and was properly dismissed.

POINT I

The appellant having failed to avail himself of the statutory review cannot complain of lack of due process, and this Court should refuse jurisdiction.

(1)

The appellant, after he was removed from his position by the Authority under and pursuant to the terms of the Security Risk Law, had the right to appeal his removal to the New York State Civil Service Commission.

The State Civil Service Commission consists of three commissioners appointed by the Governor with the consent of the State Senate for six-year terms. No more than two of the Commissioners shall be adherents of the same political party. Thus it is an independent state agency entirely removed from the employer, Transit Authority. It has general powers to carry out the civil service policy of the state as expressed in the State Constitution (Art. V, § 6) and in the Civil Service Law (Civil Service Law, §§ 3, 6; Cons. Laws, ch. 7).

This Commission, by the provisions of the Security Risk Law, has been granted a broad, general power to entertain appeals in the following terms:

“§ 6. Appeal to state civil service commission.

Any person who believes himself aggrieved by a determination of disqualification under section four of this act and any officer or employee • • • aggrieved by a • • • dismissal under the authority

of section five of this act may appeal from such determination by an application in writing to the state civil service commission within twenty days after receiving written notice of such determination.

They [the Commission or hearing officers] shall have the power to require amplification of the reasons for the action appealed from and to administer oaths, hold or conduct public or private hearings, subpoena and compel the attendance of witnesses, and the production of books, papers, records and documents. The person or persons holding such hearing shall make such inquiry as may be deemed advisable, and shall upon the request of the appellant permit him to be represented by an attorney and to present evidence in his behalf."

Thus, if the appellant felt that his employer was mistaken in its determination, or that he had been deprived of any of his substantive constitutional rights, or that he had not been accorded procedural due process, he should have raised these issues in a review before the State Civil Service Commission, which is empowered by the statute to overrule the employer's determination. The Authority could have been required by the Commission to amplify its reasons for the action appealed from. The "further activities" to which appellant refers in Point III-A of his brief, could have been thoroughly probed and examined. Finally, the contention that the appellant, as a subway conductor, was not occupying a security position, could have been urged before the Commission, and testimony could have been taken on this point.

In fact, the Commission recently overruled the dismissal of a stenographer in the New York City Department of Hospitals, and of a housing guard in the Housing Authority on the ground that it was not demonstrated that these particular employees were in security positions. These determinations of the Commission have been sustained by the court in *Matter of N. Y. City Housing Author-*

ity (*Falk*) and *Jacobs v. Falk*, Supreme Court, New York County, COXSON, J., 139 New York Law Journal 5, January 10, 1958.

The appellant cannot be heard to complain that he has not received due process of law when he himself has been unwilling to avail himself of the procedural safeguards provided by the Legislature of the State of New York against ill-considered or unjust dismissals. There can be no presumption that the State Civil Service Commission, which is charged with the administration of the entire system of civil service in the state, would not have afforded the appellant all his constitutional rights. *People ex rel. Lieberman v. Van DeCarr*, 199 U. S. 552, 562 (1905); *Plymouth Coal Company v. Commonwealth of Pennsylvania*, 232 U. S. 531, 544-45 (1913).

The appellant is not warranted in asking the Federal Court to interfere in an area of state activity until he has availed himself of the administrative measures provided by the state statute. *Gundling v. Chicago*, 177 U. S. 183, 186 (1900); *Bradley v. Richmond*, 227 U. S. 477, 485 (1912).

The New York State Security Risk Law is not defective upon its face. As written, it establishes an orderly procedure at every step of which the rights of the public employees are carefully safeguarded. It cannot be assumed that it is to be administered in such manner as to deprive the State's civil service employees of the due process to which they are entitled under the Federal Constitution. There is no allegation that the statutory procedure was incapable of affording due process to the appellant.

One point remains to be noticed in this connection. While it is true that the statute, as written, provides that the decision of the Commission, or the persons designated by it to hear and determine the appeal, shall be final and conclusive and "shall not be subject to review in any court," there is no question, under the existing law of the State.

of New York, that statutes with this language do not bar an appeal to the courts from determinations which are contrary to law or completely arbitrary. Certainly by appealing to the Commission, appellant would not have lost or waived his right to challenge the constitutionality of any of the acts either of the Authority or of the Commission. *Matter of Guardian Life Insurance Company v. Bohlinger*, 308 N. Y. 174 (1955); *Matter of Ross v. Wilson*, 308 N. Y. 605, 617 (1955).

(2)

It is obvious from the very statement of the facts that the appellant is incorrect in his assertion that the invocation of the constitutional privilege against self-incrimination, in and of itself, was the reason for his dismissal. It was the employee's refusal to answer questions put to him on behalf of his employer that prompted his dismissal, rather than the reason he gave for his refusal. The doctrine in the case of *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), which is more fully discussed in Point II, clearly holds that appellant had the obligation to assure his employer that he was not then a member of a party dedicated to the overthrow of the government by force or violence. The privilege against self-incrimination did not so change the relationship of employer and employee as to relieve him from his obligation to answer.

In *United Public Workers v. Mitchell*, 330 U. S. 75, 95-96, 102-103 (1947), it was held to be no violation of the First, Ninth or Tenth Amendments for the federal government to impose reasonable restrictions on the political activities of public employees to protect the integrity of the public service. The *Garner* case makes it clear that the state may adopt the same course (341 U. S. 716, 720-721).

The appellant contends that the Security Risk Law is unconstitutional in that it authorizes his dismissal from

public employment for membership, without *scienter*, in a subversive organization, and thereby is violative of the Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States. This is not the situation in the instant case. The question of the appellant's knowledge of the true aims and purposes of the Communist Party is not an issue in this case, because no inference as to membership in the Communist Party was raised by his refusal to answer questions as to membership in that party. It was the refusal to give the information to the employer which the employer had a right to have, rather than any inference of membership in the Communist Party that led to his dismissal. If he had acknowledged Communist Party membership, his knowledge of the aims and purposes of the party would then be an issue.

The appellant argues that he was not afforded equal protection of the laws because the New York State Court of Appeals had in other cases concluded that a lawyer had not forfeited his right to remain a member of the bar by invoking the privilege against self-incrimination, and had interpreted Article I, Section 6, of the New York State Constitution to require a public officer to sign a waiver of immunity when called before a grand jury only if the inquiry was as to his conduct in the public office he then held. None of the cases cited in the appellant's brief (p. 28): *In re Grace*, 282 N. Y. 728 (1940); *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 227 (1907); *Matter of Doyle*, 257 N. Y. 244 (1931); *People v. Harris*, 294 N. Y. 424 (1945); *People v. Doyle*, 1 N. Y. 2d 732 (1956) and *Matter of Kaffenburgh*, 188 N. Y. 49 (1907), involve an employer-employee relationship such as the one presented in this case.

On the other hand, in *Cantelino v. McClellan*, 282 N. Y. 166 (1940), the Court of Appeals, in a case affirming the obligation of police officers to execute a waiver of immunity

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On the other hand, in *Canteline v. McClellan*, 282 N. Y. 166 (1940), the Court of Appeals, in a case affirming the obligation of police officers to execute a waiver of immunity

and to testify before the grand jury about affairs taking place before the adoption of a specific constitutional requirement to such effect, held that the people have the power to set conditions for public employment, with which there must be compliance. In the absence of a showing by the appellant that contrary conclusions were reached where the employer-employee relationship was involved, he cannot successfully contend that he did not have equal protection of the laws.

The appellant's reliance on *Sheiner v. Florida*, 82 So. 2d 657 (1955), is misplaced since that court made a distinction between a refusal by an attorney to answer as to Communist Party membership on the ground of possible self-incrimination and the situation where the privilege is used by a person in public employment being questioned by his employer.

The Commissioner of Investigation, in conducting his inquiry for the City of New York and the Transit Authority as to the appellant's membership in the Communist Party, was acting in this capacity as a city officer concerned with information vital to the Transit Authority and the City. The Commissioner derives his powers from New York City Charter § 803 and is appointed by the Mayor. Therefore, he cannot be said, in any way, to have been acting as an agent for the Federal Government. Accordingly, the appellant's contention that this was, in effect, a federal proceeding, and that he cannot be penalized for invoking a federally-given privilege in a federal proceeding, is untenable. The Court of Appeals having ruled specifically that the Commissioner of Investigation was acting with the authorization, pursuant to statute, of the Transit Authority, and in the complete absence of anything in the record to indicate that the Commissioner of Investigation was acting for any federal agency, it would appear that this issue is foreclosed to the appellant.

POINT II

The refusal of a public employee to assure his employer that he was not then and had not been a member of the Communist Party, justifies the employer's conclusion that the employee is of doubtful trust and reliability.

(1)

The appellant was under an obligation to answer responsively when asked by the Commissioner of Investigation whether or not he was a current member of the Communist Party. The right of a public employer to question an employee concerning membership in the Communist Party, and the corresponding duty of the employee to make a full and frank disclosure to his employer, has received the sanction of this Court. In *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), this Court sustained a Los Angeles ordinance which required public employees to execute an affidavit as to whether they were then, or ever had been, members of the Communist Party or the Communist Political Association. Two employees, who had refused to supply this information, were dismissed. In recognizing the right of a municipal employer to make inquiry of its employees as to matters that may prove relevant to their fitness and suitability for public service, this Court removed any doubt as to the obligation of public employees to answer questions as to past conduct which might bear upon present fitness. The same basic principle was reaffirmed by this Court in *Adler v. Board of Education*, 342 U. S. 485, 492 (1952), in which the constitutionality of New York State's Feinberg Law (Education Law, § 3022), was affirmed.

The invoking of the privilege against self-incrimination by the appellant may not give rise to an inference that he

is guilty of a crime, but to retreat behind such a barrier is clearly inconsistent with the obligation a public employee owes to his employer. The refusal to answer the question thwarts the employer at the very threshold of his inquiry into his employee's loyalty, and destroys the confidence which must exist between employer and employee. This is especially true in the field of security. The reason for the employee's refusal to answer is locked within the secrets of his own mind. It leaves the employer in complete doubt as to the employee's loyalty. The employer has nothing to evaluate but the point-blank refusal.

In *Slochower v. Board of Higher Education of the City of New York*, 350 U. S. 551, rehearing denied 351 U. S. 944 (1956), and *Wieman v. Updegraff*, 344 U. S. 183 (1952), this Court was careful to cast no doubt upon the obligation of a public employee, under proper circumstances, to respond to questions put to him by his employer, by distinguishing the facts in the *Wieman* and *Slochower* cases, *supra*, from the *Garner* and *Adler* cases, *supra*. Mr. Justice CLARK, in writing for the Court in the *Slochower* case, quoted from the *Garner* decision as follows:

"... [this Court] upheld the right of the city to inquire of its employees as to 'matters that may prove relevant to their fitness and suitability for the public service,' including their membership, past and present, in the Communist Party or the Communist Political Association. There it was held that the city had power to discharge employees who refused to file an affidavit disclosing such information to the school authorities." (350 U. S. 551, at 556)

The *Slochower* case is authority only for the proposition that a teacher with tenure was denied due process when a statute was construed so as to automatically separate him from his position upon invoking the privilege against self-incrimination in refusing to answer an inquiry by a United States Senate subcommittee as to prior Com-

munist Party membership which prior membership had been known to the Board of Higher Education for some twelve years. The chairman of the subcommittee had stated that the inquiry was not directed at the property, affairs or government of the City of New York. The evil the Court found was that the statute was so constructed as to provide for automatic forfeiture of position regardless of the circumstances under which the privilege against self-incrimination was invoked. This Court anticipated the instant case when Mr. Justice CLARK, said in the *Slochower* case:

"It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or . . . official conduct of city employees.' In this respect the present case differs materially from *Garner*, where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information.

"Without attacking Professor Slochower's qualification for his position in any manner, and apparently with full knowledge of the testimony he had given some 12 years before at the state committee hearing, the Board seized upon his claim of privilege before the federal committee and converted it through the use of § 903 into a conclusive presumption of guilt. Since no inference of guilt was possible from the claim before the federal committee, the discharge falls of its own weight as wholly without support. . . ." (350 U. S. 551, at 558-559)

The record in the instant case demonstrates conclusively that the inquiry as to current Communist Party

membership was made specifically for the appellant's employer for the sole purpose of determining the employee's fitness to continue to serve as a public employee of the Authority. It is equally apparent from the record that the Authority gave careful consideration to the circumstances surrounding the asking of the question and the repeated refusal on the part of the employee to answer the question. The dismissal was based on the particular facts in the case and had none of the elements of automatic forfeiture present in the *Slochower* case. The appellant was also afforded an opportunity for a complete review of his dismissal by the State Civil Service Commission, of which he did not avail himself.

An examination of the facts in *Wieman v. Updegraff*, 344 U. S. 183 (1952), reveals that the Supreme Court of Oklahoma had interpreted the statute in such a manner that persons would be excluded from public employment on the basis of organizational membership, regardless of their knowledge of the aims and purposes of the organization to which they belonged. The New York State Court of Appeals has not interpreted the Security Risk Law in any such manner. As a matter of fact, in upholding the constitutionality of the Feinberg Law, this Court expressly noted that the New York courts had required *scienter* before dismissal could be had for membership in an organization found to advocate the unlawful overthrow of the government. See *Adler v. Board of Education*, 342 U. S. 485, 494 (1952); 301 N. Y. 476, 494 (1951).

The question put to the appellant herein, with respect to Communist Party membership, was based upon the fact that, as permitted by section 8 of the law, the State Civil Service Commission had adopted a designation of the State Board of Regents declaring the Communist Party to be a subversive organization. This procedure was the same as that provided for in the Feinberg Law which was found constitutionally unobjectionable in *Adler v. Board of Edu*.

cation, *supra*. The designation of the Communist Party by the State Board of Regents was made after due notice to said organization and an opportunity afforded it to answer.

This case is also different from *Konigsberg v. State Bar of California*, 353 U. S. 252 (1957), since in that case, an employer-employee relationship did not exist. It is distinguished on the further ground that the appellant in the case at bar at all times was made to realize that a persistent refusal to answer questions with respect to his fitness for employment would inevitably result in the loss of his position.

Equally inapplicable to the present case is *United States ex rel. Belfrage v. Shaughnessy*, 212 Fed. 2d 128 (U. S. Circuit Court, Second Circuit, 1954). That case was a deportation case, and to the extent that the decision seems to countenance the pleading of the Fifth Amendment out of a reluctance to implicate others, or to disturb their privacy, it is respectfully submitted that it is opposed to the great weight of authority in this Court. Even if it were held that the Fifth Amendment may be invoked for such reasons, it would not relieve the public employee from his obligations to his employer.

In the case at bar, Chief Judge Coxway, writing for the New York Court of Appeals, analyzed the appellant's conduct in relation to his obligations to his employer pursuant to the statute. The Court reasoned as follows (2 N. Y. 2d 355, 369):

"If seems to us that it would be more clear if we suppositiously divided the conduct of petitioner into two parts. The first, when he was asked by his employer whether he was then a member of the Communist party. That question he refused to answer. He then left the room. Certainly by that conduct he would have given evidence of his own untrustworthiness and unreliability. Suppose then, as the second part of his conduct, he returned five minutes later and told the commissioner of inves-

tigation that he had refused to answer his question because to do so might tend to incriminate him. May not the employer discharge an employee who refuses to answer his proper question? If the petitioner, in the case supposed, had not returned to the commissioner five minutes later and given a reason for his conduct, we think all would agree that he was properly discharged. Does it change the situation because he returns to say that he refused to answer because to do so might tend to incriminate him? Does that explanation destroy the evidence which he has given to his employer of his untrustworthiness and unreliability as a security risk? Does the explanation *require* that the employer consider without any doubt that the employee by his explanation has again become trustworthy and reliable as a security risk as a matter of law? We think not." (R. 83)

This Court has recognized that the rights, privileges and immunities guaranteed by the United States Constitution are not absolute and unrelated to limiting circumstances. In *Dennis v. United States*, 341 U. S. 494 (1951), this Court speaking of the alleged unconstitutional impingement of the Smith Act on the rights of free speech, said (p. 508):

"Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. See *American Communications Assn. v. Douds*, 339 U. S. at 397. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative."

The constitutional privilege against self-incrimination is not an absolute right which relieves the invoker from all

other obligations he may owe. Although it is clear that a person cannot be required to be a witness against himself and that such a refusal may not be the basis for an inference of guilt of a crime, the privilege cannot be used to compel his employer to accept its invocation as a substitute for the answer to which the employer is entitled.

See also *Ullmann v. United States*, 350 U. S. 422 (1956); *Feiner v. New York*, 341 U. S. 315 (1951); *Prince v. Massachusetts*, 321 U. S. 158 (1944); *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1941).

(2)

The contention of the appellant that no emergency could conceivably justify his dismissal, since his position as a conductor could have no rational connection with national security, is demonstrably untenable. To properly evaluate appellant's official responsibilities, reference must be made to the description of duties duly promulgated by the City Civil Service Commission in 1952. These requirements were advertised in the City Record pursuant to Civil Service Law, § 11, subd. 2, as implemented by Rule V, § IV, subd. 8 of the Civil Service Commission of the City of New York, and are printed as Appendix A to this brief. An excerpt from the Authority's rules and regulations governing conductors is printed as Appendix B. It can be readily seen that if the appellant were a member of the Communist conspiracy, he would, as an operating employee of a transit system moving six million people daily, certainly be a threat to the security of the state and the city, as well as the nation. The argument, "What harm can one conductor do?" was well answered by Mr. Justice JACKSON in his concurring opinion in *Dennis v. United States*, 341 U. S. 494, 564 (1950):

"The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected,

dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in *transportation*, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members. It also seeks to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion." (Emphasis supplied.)

In evaluating the importance of the appellant's position to the security of the state, this very point, Chief Judge CONWAY said:

" . . . [We] are in accord with respondents that the importance of the petitioner's position to the security of the State and of the City of New York can be readily seen when it is considered that in modern warfare the civilian population may well be a prime target. A bombing raid on New York City would undoubtedly be planned for a time when the maximum number of people would be in the city. The most important facility for the evacuation of the people would be the subway system. If the petitioner were a member of the Communist conspiracy he would, as an employee of the transit system in charge of a train, as conductors are, be a very real threat to the security of the State and of the city." (R. 83-84)

The recently decided case of *Cole v. Young*, 351 U. S. 536 (1956) has no application to the case at bar. The *Cole* case involved an interpretation by this Court of the so-called Federal Security Risk Law (Title 5, U. S. C., 22-1). This Court pointed out that the statute made its provisions specifically applicable to named government departments which the Court found were concerned with military operations, weapons development, international

relations, internal security, and stock piling of strategic materials. The Act then went on to empower the President to extend its provisions "to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security." The President extended the provisions of the statute to every government department. This Court held that Cole, who was dismissed under this law from his position as a food and drug inspector for the Department of Health, Education and Welfare, should have been charged pursuant to the regular removal statutes, since the governmental agency employing him was not the type of agency contemplated by the Federal Security Risk Law.

Inherent in the decision of the New York Court of Appeals in the instant case was the holding, based on the record before the Court, that the appellant did occupy a security position within the contemplation of the statute. Based on the record in this case, the appellant cannot be heard to complain of such a holding, since he did not avail himself of the right to contend that his position was not in fact a security position by seeking a review, pursuant to the statute, before the State Civil Service Commission.

(3)

The appellant contends that the principle enunciated in *Garner v. Los Angeles Board*, 341 U. S. 716 (1951), recognizing the right of the municipal employer to ask and the obligation of the public employee to answer as to Communist Party membership, is confined to those situations where a statute specifically requires the employee to make such answer. With this as his premise he argues that although the New York State Security Risk Law provides for the listing of subversive organizations after appropriate hearing, the law does not specifically obligate the employee to answer questions as to membership in such organizations.

This assumption is at complete variance with the well-established principle that certain obligations and rights flow from the very nature of particular relationships between people. It is obvious that as between husband and wife, doctor-patient, lawyer-client, teacher-pupil, employer-employee relationships exist which give rise to inherent rights and obligations over and above those relationships normally existing among people. While the law undertakes to recognize these rights and obligations by defining them in general terms, it does not create them. Clearly the law could not undertake to declare the obligations and rights in every conceivable situation which might arise in an employer-employee relationship. See *Christal v. San Francisco*, 33 Cal. App. 564; 92 P. 2d 416 (1939).

In order to secure qualified people for public service their selection and tenure are governed by law but this does not change the basic employer-employee relationship. The public employer, who is acting for the people, has the right to receive from the public employee the information the employer needs to properly discharge his trust.

The appellant argues that the New York Security Risk Law requires the public employer to make an affirmative showing of evidence to demonstrate that the employee is a security risk and cannot look in the first instance to the employee himself for assurance as to his trustworthiness. The New York Court of Appeals in its interpretation of the statute rejected such a strained construction and reiterated the time-honored obligations inherent in the employer-employee relationship. The Court pointed out in this case (2 N. Y. 2d 355, 369):

"The intent of the Security Risk Law was to set up a removal procedure which would provide a more ready means of removing security risks from public service than sections 22 or 12-a of the Civil Service Law. This is apparent from the fact that even under the Civil Service Law an employee, refusing to answer questions put to him by his employer pertaining to his official conduct, may be

removed, after a hearing, under a charge of insubordination without any showing by the employer of the information which prompted the inquiry." (R. 83)

It is apparent from an examination of the Security Risk Law that public employers are directed by the legislature to remove public employees properly found to be of doubtful trust and reliability. Having imposed this duty upon the employer it necessarily follows that the employer was empowered to make inquiry of the employee himself, surely the most direct as well as the fairest means of ascertaining the truth.

The Security Risk Law, as interpreted by the New York Courts, is a proper means taken by a state to protect the state and the nation from public employees concerning whose loyalty a reasonable doubt exists. The refusal to answer questions as to membership in an organization found, after due hearing, to be subversive provides a reasonable basis for the employer to conclude that the employee has broken the confidence which the public has a right to make a condition of continued employment.

: CONCLUSION

This appeal should be dismissed for lack of jurisdiction or, if jurisdiction is taken, the order appealed from should be affirmed.

Dated: February 24, 1958.

Respectfully submitted,

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Appendix A**"MUNICIPAL CIVIL SERVICE COMMISSION
THE CITY OF NEW YORK**

NOTICE OF EXAMINATION

No. 6505**PROMOTION TO CONDUCTOR
New York City Transit System**

• • •

DUTIES: To be immediately responsible for the safety, regularity and proper care of trains, in accordance with the rules, regulations and special instructions governing the employees in operation; when assigned as conductor of trains to take charge of trains; when assigned to secondary position of trains, to assist conductor in charge in the performance of his duties; when assigned to stations, to handle passengers, assist in the safe dispatch of trains, watch exit gates, patrol stations and perform special duties for the protection of passengers; when assigned to yard or work-train service, to operate hand-throw switches, assist in making couplings, serve as flagman; turn in lost property; make detailed reports of unusual occurrences; perform such other duties as the Board of Transportation is authorized by law to prescribe in its regulations." (The City Record, Vol. LXXX, p. 6268, Sept. 9, 1952).

Appendix B

Pursuant to Public Authorities Law, § 1204, the Transit Authority has adopted and promulgated Rules and Regulations governing employees engaged in operation of the New York City Transit System. Rule 99 proclaims the duties of conductors assigned to train service. The following excerpts from this rule demonstrate some of the responsibilities vested in Conductors, the position formerly held by appellant:

- “(b) They will have charge of trains and be responsible for the safety, regularity and proper care and condition of trains, and such orders as they may give, not conflicting with the rules and regulations or special instructions, must be obeyed.
- “(c) THEY MUST TAKE EVERY PRECAUTION FOR THE SAFETY OF THEIR TRAINS AND PASSENGERS AND IF ANY DEFECTS ARE FOUND IN THE CARS THEY MUST REPORT SAME PROMPTLY TO MOTORMAN AND TRAIN DISPATCHER.
- “(v) If, for any cause, the train comes to a stop at an unusual point not protected by signal, the conductor responsible for the door operating position governing the rear car or cars, must immediately protect the rear end of the train by stationing himself with a lamp or flag in the rear of the train prepared to flag the following train at a safe distance away to avoid collision.”

(855)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 165

MAX LERNER,

Appellant,

against

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J.
KLEIN, HENRY K. NORTON, and DOUGLAS M.
MOFFAT, constituting the New York City Transit
Authority,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE
OF NEW YORK

**BRIEF OF THE STATE OF NEW YORK AMICUS
CURIAE IN SUPPORT OF AFFIRMANCE**

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SUBJECT INDEX.

	PAGE
Statement	1
Jurisdiction	2
This Court should not take jurisdiction of the appeal	3
The Decisions of the Courts Below	3
The Material Facts	4
The Statute Involved	6
Construction of Security Risk Law by New York State Civil Service Commission and the New York courts in respect to necessity that employees be in security positions for application of the law to them	9
The Question Presented	10
Summary of Argument	12
Argument	
I—Prior decisions of this Court and the principles upon which these rest sustain the right of the Transit Authority to dismiss Appellant as of doubtful trust and reliability because of his refusal to answer the question whether he is or was a member of the Communist Party	14
A—The principles underlying (1) the right of government to provide that employees in security and sensitive positions be of undoubted trust and reliability, and (2) the obligation of the government employee to inform his employer as to whether he is a member of the Communist Party	14
B—Government may constitutionally enact legislation to protect the nation, the states and all units of government against persons	

II.

PAGE

of doubtful trust and reliability in security positions	17
C—Appellant's employer had the right to insist on being informed by him whether he was a member of the Communist Party, and he had no right to insist on resisting the demand as constitutionally objectionable. Appellant's refusal to answer the question justified his being determined to be of doubtful trust and reliability in a security position	19
II—Appellant was not discharged for pleading the Fifth Amendment. His adding the plea to his refusal to answer the question as to Communist Party membership cannot have the effect of blocking Government from exercising its right to dismiss him, as of doubtful trust and reliability, for refusing to reveal whether he is a member of the Communist Party	25
III—Appellant was not discharged for membership in the Communist Party. Accordingly, no question of the validity of a discharge on such ground is before the Court, and this Court, in keeping with its policy of refraining from reaching constitutional issues unless necessary, will not consider the question. Moreover, appellant's arguments on the subject are adverse to prior decisions by this Court and the principles on which they are based.	31
Conclusion.	33

AUTHORITIES CITED.

CASES.

<i>Adler v. Board of Education</i> , 342 U. S. 485	21, 23, 32, 33
<i>American Communications Association v. Douds</i> , 339 U. S. 382	19, 22, 23, 32
<i>Barsky v. Board of Regents</i> , 347 U. S. 442	10, 23, 29
<i>Board v. Hearst Publications</i> , 322 U. S. 111	10

III.

	PAGE
<i>Cole v. Young</i> , 351 U. S. 536	17, 18
<i>Dennis v. United States</i> , 341 U. S. 494	16, 18
<i>East New York Savings Bank v. Hahn</i> , 326 U. S. 230, 235	19
<i>Emspak v. United States</i> , 349 U. S. 190	26
<i>Garner v. Los Angeles</i> , 341 U. S. 716 ..	20, 23, 24, 25, 28, 32
<i>Gerende v. Election Board</i> , 341 U. S. 56	21, 22, 23
<i>Konigsberg v. State Bar of Los Angeles</i> , 353 U. S. 252	23, 24
<i>Matter of Hehir v. New York City Transit Authority</i> , N. Y. Supreme Court, Kings Co. Index #4071 (1956)	26
<i>Matter of Jacobs v. Falk, et al.</i> , (N. Y. L. J. 1/10/58, p. 5, columns 5-6; unreported).	9
<i>Matter of New York City Housing Authority v. Falk</i> , <i>et al.</i> , (N. Y. L. J. 1/10/58, p. 5, columns 5-6; unre- ported)	9
<i>Milwaukee Publishing Co. v. Burleson</i> , 255 U. S. 407 ..	15
<i>New York City Transit Authority v. Loos</i> , 2 N. Y. Misc. 2d 733	17
<i>Noble State Bank v. Haskell</i> , 219 U. S. 104	15, 16
<i>People v. Bradley</i> , 207 N. Y. 592	33
<i>Peters v. Hobby</i> , 349 U. S. 331	32
<i>Quinn v. United States</i> , 349 U. S. 155	26
<i>Rochester Telephone Corp. v. United States</i> , 307 U. S. 125	10
<i>Schware v. Board of Bar Examiners</i> , 353 U. S. 232 ..	24
<i>Slochower v. Board of Education</i> , 350 U. S. 551	12, 28, 29, 30
<i>Standard Oil Company v. New Jersey</i> , 341 U. S. 428 ..	10
<i>Ullmann v. United States</i> , 350 U. S. 422	27, 28
<i>United States v. Auto. Workers</i> , 352 U. S. 567	32

STATUTES.

L. 1951, ch. 233; McKinney's Unconsolidated Laws §§ 1101-1108 (Security Risk Law)	1, 2, 6-9, 30, 31
L. 1949, ch. 360 (Feinberg Law)	4, 32-33
National Labor Relations Act § 9(h)	22

IV.

MISCELLANEOUS.

PAGE

Opinion of New York Civil Service Commission in Matter of Reif	9, 10
Opinion of New York Civil Service Commission in Matter of Wyatt	9, 10
Report of Committee on Public Employee Security Procedures	10
24 U. S. Law Week, October 25, 1955	29

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 165

MAX LERNER,

Appellant,

against

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN, HENRY K. NORTON, and DOUGLAS M. MOFFAT, constituting the New York City Transit Authority,

Appellees:

**BRIEF OF THE STATE OF NEW YORK AMICUS
CURIAE IN SUPPORT OF AFFIRMANCE**

Statement

This brief is filed by the State of New York by its Attorney General in support of the constitutionality of Chapter 233 of the Laws of New York of 1951, popularly known as the New York Security Risk Law, and of the application of the statute to this appellant.

The Attorney General similarly appeared in this litigation in the State Courts of New York. The Attorney General was invited by counsel to the Transit Authority at the outset of the litigation to participate in it.

The Attorney General is appearing in the case not only pursuant to his duty under New York Executive Law § 71 to appear in support of the constitutionality of a State statute when the constitutionality is challenged, but he is appearing, in essence, on behalf of the New York State Civil Service Commission. This is because the initial responsibility for administering the New York Security Risk Law is, by its provisions (summarized *infra*), placed upon the State Civil Service Commission. The Commission is the official agency having the primary duties under this statute to set in motion all other proceedings that take place pursuant to it. The first administrative step under this statute is the designation of security agencies and security positions. Such designation is made by the State Civil Service Commission. The Commission also has appellate jurisdiction, by provision of the statute, to review a determination of the employing agency relative to an employee, at the instance of the employee claiming to be aggrieved thereby.

The State Civil Service Commission was not made party respondent in the instant case, apparently because appellant here did not utilize the provisions for appeal to the Commission from the Transit Authority's determination, but instead brought the present proceeding.

Jurisdiction

A motion was made by appellees to dismiss this appeal. In opposition thereto, appellant filed a brief. This Court made its order on October 14, 1957, postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. p. 76; 355 U. S. 803).

This Court Should Not Take Jurisdiction of the Appeal

We are in accord with the position taken by appellees on the motion to dismiss the appeal. The grounds urged were that (1) no substantial Federal questions are presented, and (2) in part, the Federal questions appellant seeks to raise were not timely or properly raised or expressly passed upon by the State Courts. The second contention has in effect been partially conceded by appellant in his brief filed in opposition to the motion to dismiss the appeal (pp. 9-10 of that brief). In his brief on the merits, appellant has indeed omitted from his enumeration of Questions Presented (R. pp. 2-3), the question numbered 7 in his Notice of Appeal.

In the Argument, we shall show that neither the statute involved nor the action taken under it in respect to appellant, violates any provision of the Constitution, and that prior decisions by this Court and the principles enunciated by this Court upon which these decisions rest, clearly support both.

Consequently, the appeal presents no substantial Federal question. Nor is the case an appropriate one for certiorari as contended by appellant (Br. p. 11), since the State Court in this case did not decide a Federal question of substance not heretofore determined by this Court but decided the Federal questions raised in accord with applicable decisions of this Court.

The Decisions of the Courts Below

The opinions of the New York Court of Appeals are reported in 2 N. Y. 2d 355.

The opinions of the New York Appellate Division are reported in 2 A. D. 2d 1.

The opinion of the New York Supreme Court, Kings County is reported in 138 N. Y. S. (2d) 777 (not officially reported).

The Material Facts

The three Courts of this State before which this case has come have all concurrently held (1) that the Security Risk Law is valid and constitutional, and (2) that the determination of appellees as members of the New York City Transit Authority as to the scope, and application to appellant, of the law was neither arbitrary nor capricious but should be approved.

On November 23, 1953, the State Civil Service Commission declared the New York City Transit Authority to be a security agency within the meaning of the Security Risk Law.

The Commission on March 24, 1954 by Resolution listed the Communist Party of the United States and of the State of New York as subversive within the meaning of the Security Risk Law. This was based upon and was an adoption of such listing of the Communist Party by the State Board of Regents under the Feinberg Law (N. Y. Laws 1949, ch. 360). The Regents acted after hearings, at which the Communist Party appeared by counsel, caused testimony to be taken, submitted briefs and made oral arguments.

The facts as to appellant as here set forth are taken from appellant's petition and exhibits attached thereto. Appellant was a conductor on the New York City subways, which are operated by the Transit Authority, the appellees, the facilities being owned by New York City (R. p. 6). On

September 14, 1954, pursuant to instructions from his supervisor, he appeared at the office of the Commissioner of Investigation of the City of New York (R. p. 6). He refused to answer questions as to whether or not he was a member of the Communist Party, and invoked the Fifth Amendment (R. p. 10). He was advised of the provisions of the Security Risk Law and given an opportunity to reconsider his refusal (R. p. 10). On September 21, he appeared at the office of the Department of Investigation and was granted time to engage counsel (R. p. 10). On September 30, he appeared with counsel and was granted a further adjournment (R. p. 10). On October 8, he appeared with counsel, was advised that the investigation was being conducted as authorized by the Mayor, pursuant to the Security Risk Law (R. p. 7). He again "refused to answer questions as to whether he was then or had been a member of the Communist Party, and again invoked the Fifth Amendment" (R. p. 10). On October 21 (two weeks later), the New York City Transit Authority, by its General Manager, wrote to appellant, informing him that he was suspended from his position, effective at close of business the following day, pursuant to Section 5 of the Security Risk Law, and that he had the opportunity, within 30 days, to submit statements or affidavits to show why he should not be reinstated (R. pp. 10-11). The letter suspending him enclosed a copy of the Transit Authority's Resolution of suspension stating the reason therefor (R. pp. 10-12), and informed appellant:

*** This action has been taken because *** when testifying under oath at the office of the Commissioner of Investigation of The City of New York, you refused to answer questions as to whether you were then a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the United States. Furthermore, having been advised of the provisions of the Security Risk Law (L. 1951, C. 233, as amended),

and after having been given an opportunity to reconsider your refusal, and having been given a postponement * * * to engage counsel, and a further adjournment at the request of your counsel * * * you appeared with counsel * * * and again refused to answer questions as to whether you were then or had been a member of the Communist Party and again invoked the Fifth Amendment to the Constitution of the United States.

You have the opportunity, within thirty days after this notification, to submit statements or affidavits to show why you should be reinstated or restored to duty.

Nothing was heard from appellant and, on November 24, 1954, the Transit Authority wrote him, terminating his employment, stating the reasons therefor, and enclosing a copy of the Transit Authority's Resolution of termination which also stated the reasons for termination of the employment (R. pp. 13, 15).

Two weeks after the termination of his employment, appellant brought the proceeding which is here on appeal. Appellant did not appeal to the Civil Service Commission, as he might have under Section 1106 of the Security Risk Law (summarized *infra*). Thus he did not exhaust the remedies which were given him under the statute. Had he appealed, he would have had pursuant to § 1106, a hearing, and the right to appear by counsel and produce evidence. The Civil Service Commission is empowered by the section to reverse or modify the determination of the employing agency.

The Statute Involved

The statute here before the Court is commonly known as the "Security Risk Law" and will be so referred to in this brief. The law was adopted in 1951 (L. 1951, ch. 233) with

June 30, 1952 as its terminal date. It has been extended annually since then. Its present terminal date is June 30, 1958* unless again extended. Recommendations are before the Governor that the law be continued.

In the first section (§ 1101) there is set forth the declaration of legislative findings and intent. "Security agency" and "security position" are defined (§ 1102). The duty of designating such agencies and positions is placed upon the State Civil Service Commission.

In § 1105 is provided the ground upon which a state or municipal employer may take action under the statute. It is when "upon all the evidence, reasonable grounds exist for belief that because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state." The section provides the alternative actions which the employer may take in such event, and the procedure to be followed. The employee initially may be transferred from his position to a nonsecurity position or he may be suspended. He has "opportunity" within thirty days to "submit statements or affidavits to show why he should be reinstated or restored to duty". The employer may then, after review of its prior action affirm the transfer, or terminate the employment, or restore the employee to his position with back pay for the period of suspension.

Appeal by the employee to the State Civil Service Commission is provided in § 1106. The proceedings to be had upon such appeal are specified. They are:

1. A hearing is mandated at a set time and place upon due notice.

* The law is to be found in McKinney's Unconsolidated Laws of New York §§ 1101-1108, and the reference to it in this brief will be to the sections of it in that compilation.

2. The Commission or person or persons it designates has power to "require amplification of the reasons" for the action appealed from; to hold public or private hearings; to subpoena and compel the attendance of witnesses, and the production of books, papers, records and documents; to make such inquiry as he deems advisable.
3. Appellant must on request be permitted to be represented by an attorney and to present evidence in his behalf.
4. The Commission may affirm, reverse or modify the determination it is reviewing.
5. If it reverses, the employee is reinstated with back pay to a dismissed employee to the date of suspension.

Section 1107 provides that the evidence upon which a determination may be based *may include* "to the extent deemed appropriate, *but . . . shall not be limited* to evidence of" four forms of conduct. One of these is "membership in any organization or group found by the State Civil Service Commission to be subversive" (emphasis supplied).

Section 1108 provides that a subversive group or organization, as used in the law, shall be one found by the State Civil Service Commission, after inquiry and appropriate notice and hearing, to advocate the overthrow of the government by force and violence, or so designated by the United States Attorney General or by the State Board of Regents pursuant to the Feinberg Law, provided these designations were made upon notice to the organization or group and opportunity afforded to answer.

Construction of Security Risk Law by New York State Civil Service Commission and the New York courts in respect to necessity that employees be in security positions for application of the law to them.

The New York State Civil Service Commission has construed the Security Risk Law as making an employee dismissable from a security agency only when his position is such that by sabotage, disclosure of governmental information or by other means, he is in a situation where he can imperil the security and defense of the nation and state; that this factor must be present coupled with a determination that the employee is of doubtful trust and reliability.

This construction was contained in an opinion rendered by the Commission in *Matter of Reif* on May 10, 1957. It was followed by an opinion to the same effect in *Matter of Wyatt* rendered on August 12, 1957. The Commission's construction was upheld on January 8, 1958 by the New York Supreme Court, New York County (Mr. Justice Francis X. Conlon) in *Matter of Jacobs v. Falk, et al.* and *Matter of New York City Housing Authority v. Falk, et al.* (New York Law Journal, January 10, 1958, p. 5, columns 5-6; unreported). The two proceedings were brought by the agencies employing Reif (*Matter of Jacobs*) and Wyatt (*New York Housing Authority*).

This construction of the statute is implicit in the Court of Appeals opinion in the instant case, since the Court affirmed the discharge of appellant as proper, because as a subway conductor he was in a sensitive or security position (R. p. 61).

Since this Court holds that construction of a statute by the department or agency which administers it is to be accepted by the courts if there is a "rational basis" for it

(*Rochester Telephone Corporation v. United States*, 307 U. S. 125, 146 [1939]; *Board v. Hearst Publications*, 322 U. S. 114, 131 [1944]), and since this Court deems itself concluded by the interpretation of a State statute by the highest Court of the State of its enactment (*Barsky v. Board of Regents*, 347 U. S. 442, 448 [1954]; *Standard Oil Company v. New Jersey*, 341 U. S. 428, 432 [1951]), this Court is to weigh this statute as one which can affect only employees in security or sensitive positions.

Appellant has appended as an Appendix B to his brief (pp. 42-46) the interim report of the Committee on Public Employee Security Procedures, appointed by the Governor of New York in September 1956. The Committee issued its final report on January 8, 1958*, expressing satisfaction with the construction of the statute by the New York State Civil Service Commission and the view of the Committee that this construction is "in accord with the basic objective of a 'security' law".

The Question Presented

The main issue before this Court upon this appeal is whether a government employer administering a State law which authorizes the discharge of an employee from a security position when "reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state", may discharge an operating employee of the New York City subway system for refusal to answer the question asked him

* The report was issued prior to the decisions of the Supreme Court. New York County, in *Matter of Jacobs and N. Y. City Housing Authority*, *supra*, which upheld the Commission's construction of the law.

by his employer whether he is a member of the Communist Party.

A secondary question also arises, by the act of appellant in coupling his refusal with an invocation of the Fifth Amendment, to wit: may this employee by such invocation block the employer's performance of the duty imposed on it by law to ascertain whether persons "of doubtful trust and reliability" are occupying "security positions."

That these are the issues, and that their formulation in appellant's brief is inaccurate, is shown by reference to the opinion of the Court of Appeals of New York, which held:

1. "The Transit Authority has been properly denominated a security agency." It performs a function necessary to the security or defense of the nation and the state. "The most important facility for the evacuation of the people," in the event of an enemy raid on New York City "would be the subway system" (R. pp. 58, 61).

2. If appellant were a member of the Communist conspiracy, he would, in his position as a subway conductor, be a "very real threat to the security of the State and of the City" (R. p. 61).

3. Appellant's refusal to reply to the crucial question of Communist Party membership was evidence of doubtful trust and reliability, the ground for discharge under the statute (R. pp. 59, 63).

4. Appellant was not discharged on the ground that he was a Communist Party member. "No inference of membership . . . was drawn from . . . refusal to reply to the question asked" (R. p. 63).

5. Appellant's explanation that he refused to answer because to do so would tend to incriminate him, did not change his having "given evidence of his own untrustworthiness and unreliability" by refusing to answer the question. (R. pp. 60, 64).

6. Current events confirm the need for this statute and the wisdom of the Legislature in enacting it (R. p. 61).

7. The instant case is altogether distinguishable from *Slochower v. Board of Education*, 350 U. S. 551 [1955] (R. p. 63).

8. Appellant's dismissal does not abridge his privileges and immunities as a citizen of the United States since it was "to thwart his employer in ascertaining whether or not he is a member of a criminal conspiracy" that he asserted his constitutional privilege (R. p. 64).

9. The Transit Authority is an agency governed by the Security Risk Law. The Commissioner of Investigation was its agent in making the inquiry of appellant (R. pp. 56-57).

Summary of Argument

1. This appeal does not present questions such as those framed by appellant. Appellant's argument throughout his brief is premised on a misstatement of the ground for discharge and of the holding of the State courts.
2. Appellant's refusal to answer the question as to whether he was a member of the Communist Party was the ground for his discharge. Under the decisions of this Court the government agency employing him

was entitled to have the answer to this question from him.

3. The added plea by appellant of the Fifth Amendment does not nullify the right of his government employer to dismiss him for refusing to give it the information it is entitled to have from him, as to whether he is a member of the Communist Party.
4. A number of appellant's arguments are foreclosed by the construction placed upon this statute by the highest court of the State of New York.
5. Appellant was not dismissed as being a member of the Communist Party. Therefore all of appellant's arguments in respect to the validity of the discharge for Communist Party membership are not to be considered by this Court, in keeping with its policy not to reach questions of constitutionality until a concrete situation is before it which inescapably presents them. Moreover, appellant's arguments on the subject are adverse to prior decisions by this Court and the principles on which they are based.
6. Government may provide for removal of persons of doubtful trust and reliability as security risks, from sensitive positions. Appellant was employed in a security position.

ARGUMENT

POINT I

Prior decisions of this Court and the principles upon which these rest sustain the right of the Transit Authority to dismiss appellant as of doubtful trust and reliability because of his refusal to answer the question whether he is or was a member of the Communist Party.

A.

The principles underlying (1) the right of government to provide that employees in security and sensitive positions be of undoubted trust and reliability, and (2) the obligation of the government employee to inform his employer as to whether he is a member of the Communist Party.

Before citing the decisions of this Court which, we submit, are precedent in support of the determinations in the instant case by the State courts, we consider certain fundamental principles underlying and threading through these decisions. They are principles which have inevitably evolved because inevitably situations have arisen presenting the problem of accommodating the rights and liberties guaranteed to the individual by the Constitution with the necessity for safeguarding the public interest. Public interest has indeed been deemed to require balancing with individual rights, not only when the very existence of the government and the nation under which that Constitution with its guaranteed rights and liberties may be preserved are involved, but in respect to less acute aspects of that interest.

The principles are not new ones conceived in haste or in fear to meet the problems of this day and era, sacrificing

for expediency's sake individual freedoms to national security.

Great and liberal judges a half century ago, in an age when there was no thought of danger to the security of this nation from without or from within understood that

"* * * we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual * * *." (Mr. Justice Holmes in *Noble State Bank v. Haskell*, 219 U. S. 104, 110 [1911]).

In 1921, in *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 414, this Court warned that

"* * * The Constitution was adopted to preserve our Government, not to serve as a protecting screen for those who while claiming its privileges seek to destroy it."

In the last decade has arisen the problem of reconciling the right of an individual to be a member of the Communist Party, if he is so minded, with the need of the Nation to protect itself against the threat that Communism holds for it. Those most dedicated to the ideal of individual liberty acknowledge that the Communist Party is not simply a political party; that it has ties with the Soviet government; that traditionally it has advocated the use of force and violence to achieve its goals; that therefore Communism and the Communist Party present a specific type of problem.

The legislative and executive branches of our government have striven and are striving to meet this special problem on both fronts which Communism is known to em-

ploy: preparation for war and subversion. For our Nation's protection our government is endeavoring to match Communist missiles, satellites, atomic and hydrogen bombs, planes and other armaments. For our Nation's protection our government seeks to meet by means of security legislation, Communist subversion and infiltration in its ranks. Those most dedicated to the ideal of individual liberty recognize that our government need not remain passive and permit such subversive infiltration. However one may dislike the need for such legislation as qualifying the concept of complete liberty of the individual, the constitutional issue which it presents is not whether it limits at all the liberty set forth in the Bill of Rights. Of course it does. Unrestricted liberty is not possible, does not exist and never has existed in the United States or in any organized society. The rules of the road, the need for a license to drive a car or get married, every penal law in the land is a restraint of individual liberty in the interest of the public as a whole. It is the restraint constitutionally permissible because the words of the Bill of Rights cannot, as Mr. Justice Holmes said (*Noble State Bank v. Haskell, supra*, 219 U. S. 104, 110 [1911]), be pressed "to a drily logical extreme".

The effect of security legislation upon the liberty of the individual to be a member of the Communist Party without the necessity for disclosing such fact to an employer in certain circumstances, and without in some form or in some manner being damaged by the exercise of his freedom to be a member of the Communist Party, is another instance of "striking a balance" (*Dennis v. U. S.*, 341 U. S. 494, 561 [1951]) between the total liberty of any one individual and the interests and welfare of every individual in the land united as a nation.

B.

Government may constitutionally enact legislation to protect the nation, the states and all units of government against persons of doubtful trust and reliability in security positions.

The premise of *Cole v. Young*, 351 U. S. 536 (1956) is that persons of doubtful trust and reliability may be dismissed from security positions in government.

Appellant, an operating employee of the New York City Subway System, was employed in a security position. The subway system in New York City is its lifeline. In *New York City Transit Authority v. Loos*, 2 N. Y. Misc. 2d 733, 738 (1956) the Court pointed out:

"It is easy to forget, while the subways are running, that there is room for motor vehicles on the streets only because millions travel by subway; for if all persons had to use surface transportation, the bridges and tunnels and main highways would soon be hopelessly clogged. New York with its immense territory and its five separate boroughs, is dependent for its very life and daily functioning, and for the immediate safety of its 8,000,000 inhabitants, on rapid transit facilities which are necessarily used by nearly all persons engaged in all of its governmental and other vital functions. Whatever may be the case elsewhere, and under other conditions, whatever may have been the case in other times, here and now, and for this city, the operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare. It is worth re-emphasizing that the subways are the city's arteries upon which its life and daily living depend. . . ."

Appellant would minimize the significance of his occupation. We venture to say, however, that a subversive organization would sooner have as an adherent a utility company employee situated so that he can obstruct its

mechanical and physical operation than the Chairman of the Board. The late Mr. Justice Jackson pointed out in his concurring opinion in *Dennis v. United States*, 341 U. S. 494, 564 (1950):

"The Communist Party . . . seeks members that are, or may be, secreted in strategic posts in *transportation*, communications, industry, government" (emphasis supplied.)

The reasons why operating personnel of transportation systems and utilities must be persons whose loyalty is beyond question, is self-evident: One person, whatever his position, is in a situation where he could paralyze, disrupt or create panic in a community, causing it to become fertile field and easy prey to enemy action. A subway conductor in New York City does not occupy the innocuous position that appellant would portray. Wearing a uniform, having a badge and a pass, he has access to premises of the system from which the whole operation of the subways is controlled. If there were among the subway conductors a person who was dedicated to carrying out enemy purposes, he would be able to get to vulnerable points where persons not so employed could not.

Whether or not a member of the public could, as appellant contends, cause the disruption of subway operation by some means, it is not required by the Constitution that government hire and retain someone to do it.

The premise in the *Cole* case also is (id. p. 546) that the procedure provided in security legislation would be summary.

The premise in that case, further, is acceptance by this Court of the propriety at this time of enactment or continuance of security legislation, which appellant questions

(Br. p. 21). The Court of Appeals of New York found a continuing need for this statute (R. p. 61). Moreover, as has been said in a multiplicity of cases (e.g., *American Communications Association v. Douds*, *supra*, 339 U. S. at pp. 400-1, 419), the Courts will not substitute their judgment for that of the legislative arm of government as to the necessity or desirability of a statute. This Court has also held that the need for retaining a law need not be the one which brought about its enactment. New circumstances or a new emergency will justify the renewal of a law which other circumstances or another emergency brought into being. (*East New York Savings Bank v. Hahn*, 326 U. S. 230, 235 [1945])

C.

Appellant's employer had the right to insist on being informed by him whether he was a member of the Communist Party, and he had no right to insist on resisting the demand as constitutionally objectionable. Appellant's refusal to answer the question justified his being determined to be of doubtful trust and reliability in a security position.

Appellant was discharged, as the Court of Appeals said (R. p. 63) "for creating a doubt as to his trustworthiness and reliability by refusing to answer the question as to Communist Party membership."

This Court has upheld the right of government to require its employees to disclose to it whether they are mem-

* By his refusal to answer the question, appellant raised "doubt" but that he might be a member with complete knowledge of and with ardent adherence to a goal of the Party of overthrowing our government by force and violence. Had he answered the question in the affirmative, he could have explained his situation; that is to say, either that he was not a member or that he was a member but that he did not understand Communist Party purposes to be advocacy of overthrow of the government, or subversion, or any designs against our nation's security.

bers of the Communist Party, and the obligation of government employees to give the employer this information. *Garner v. Los Angeles*, 341 U. S. 716 (1951).

Mr. Justice Clark, writing for the Court, stated why the inquiry may be made and why there is the obligation to answer (p. 720):

"The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.

We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

Mr. Justice Frankfurter, concurring, explained why the Constitution permits the eliciting of such information from the employee (pp. 724-726):

"The Constitution does not guarantee public employment. City, State and Nation are not confined to making provisions appropriate for securing competent professional discharge of the functions pertaining to diverse governmental jobs. They may also assure themselves of fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it. No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such

endeavor. See *Gerende v. Board of Supervisors of Elections*, 341 U. S. 56.

• • • A municipality like Los Angeles ought to be allowed adequate scope in seeking to elicit information about its employees and from them. It would give to the Due Process Clause an unwarranted power of intrusion into local affairs to hold that a city may not require its employees to disclose whether they have been members of the Communist Party or the Communist Political Association. In the context of our time, such membership is sufficiently relevant to effective and dependable government, and to the confidence of the electorate in its government. • • • the two employees who were dismissed solely because they refused to file an affidavit stating whether or when they had been members of the Communist Party or the Communist Political Association cannot successfully appeal to the Constitution of the United States."

Other decisions of this Court have recognized the legitimate concern of government with the fact of membership of an employee in the Communist Party, and the constitutional propriety of government taking measures to control the employment in government of members of the Communist Party.

Conspicuous decisions in this area are *Adler v. Board of Education*, 342 U. S. 485 (1952) and *Gerende v. Election Board*, 341 U. S. 56 (1951). In the *Adler* case this Court held that the State of New York could make membership in any organization listed by the State Board of Regents as advocating the overthrow of the government by force, violence or unlawful means, disqualification for employment in the public schools of the state. This Court declared (*supra*, 342 U. S. at p. 493)

"In the employment of officials and teachers of the school system, the State may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the State,

when determining the fitness and loyalty of such persons, from considering the organizations with whom they associate."

In the *Gerende* case this Court held that the State of Maryland could validly require that in order for a candidate for public office to obtain a place on the ballot he must make oath that he is not knowingly a member of an organization engaged in an attempt to overthrow the government by force or by violence.

American Communications Association v. Douds, 339 U. S. 382 (1950) upheld the constitutionality of Section 9(h) of the National Labor Relations Act which denies the benefits of certain provisions of the Act to any labor organization whose officers have not filed with the National Labor Relations Board an affidavit to the effect that they are not members of the Communist Party. The case was the first, in recent years, which dealt with the need for reconciling the liberty of the individual to be a member of the Communist Party with the right of the public to be protected from members of the Communist Party in certain positions. The opinions of this Court carefully analyzed the arguments made in challenging the statute. The Court found that the Constitution did not prohibit the statutory requirement. Mr. Justice Jackson took cognizance of the fact that the oath was resented by many labor leaders, including those who were not Party members, and commented (pp. 434-5):

"... I suppose no one likes to be compelled to exonerate himself from connections he has never acquired. I have sometimes wondered why I must file papers showing I did not steal my car before I can get a license for it. But experience shows there are thieves among automobile drivers, and that there are Communists among labor leaders. The public welfare, in

identifying both, outweighs any affront to individual dignity."

It would appear to follow *a fortiori* that since the inquiry as to Communist Party membership is constitutionally proper as to all employees of a municipality (*Garner v. Board of Education, supra*), it is constitutionally proper to make this inquiry under a security risk law which is applicable only to employees in security positions; and that since the matter of Communist Party membership is relevant to fitness for employment as a teacher (*Adler v. Board of Education, supra*), to candidacy for any public office (*Gerende v. Election Board, supra*), to fitness of officers of labor unions (*American Communications Association v. Douds, supra*), it is relevant to fitness for security positions.

In answer to appellant's contention that the statute here does not explicitly provide for this inquiry as to Communist Party membership*, this Court will accept as conclusive (*Barsky v. Board of Regents, supra*, 347 U. S. 442 [1954]) the construction by the Court of Appeals of New York of the New York statute, as implicitly permitting this question to be asked, and the refusal to answer it as creating doubt as to trustworthiness and reliability (Court of Appeals op. R. pp. 63-4).

Appellant cites *Konigsberg v. State Bar of Los Angeles*, 353 U. S. 252 (1957). He suggests that the *Garner* case might be regarded as "overruled" or "narrowed" by the *Konigsberg* decision. The *Garner* case was not so much as

* Appellant argues that the statute in the *Garner* case gave warning that dismissal will follow nondisclosure. Appellant in the instant case was told by his employer when he refused to answer the question that this refusal would result in action being taken under the Security Risk Law (R. pp. 10-11).

mentioned in any of the opinions in the *Konigsberg* case, either the prevailing or the dissenting opinions. A case of its significance would not be overruled without express reference to it. The obvious reason why it was not necessary to refer to the *Garner* case in the *Konigsberg* case is that the two cases are in no wise similar; the issue in the one is wholly unrelated to the issue in the other. In the *Konigsberg* case the issue was whether the candidate for admission to the bar had established that he was of good moral character. This Court held that his refusal to tell the Bar Committee whether he was a member of the Communist Party did not constitute a failure to prove that he was of good moral character, which alone would justify refusal of admission to practice law. Neither side claimed that *Konigsberg* was denied admission to the bar for anything but a question of his moral character; neither side asserted that he was denied admission to the bar for refusal to answer the question as to Communist Party membership. The case had no relation to sensitive employment. A Communist of the highest moral character might indeed be so true and honest in his devotion to Communism that his danger in sensitive employment would be the greater. But a Communist as a lawyer could spend a life time at the Bar without being in any situation where he would be a threat to the security of the nation and State. The criteria for admission to the bar and for sensitive employment being completely dissimilar, the *Konigsberg* decision has no bearing on the principle of the *Garner* case, the principle which governs the instant case.

The same distinguishing factor makes inapplicable here *Schware v. Board of Bar Examiners*, 353 U. S. 232 (1957), which appellant also cites.

POINT II

Appellant was not discharged for pleading the Fifth Amendment. His adding the plea to his refusal to answer the question as to Communist Party membership cannot have the effect of blocking Government from exercising its right to dismiss him, as of doubtful trust and reliability, for refusing to reveal whether he is a member of the Communist Party.

The Court of Appeals held that "petitioner was not discharged for invoking the Fifth Amendment. He was discharged for creating a doubt as to his trustworthiness and reliability by refusing to answer the question as to Communist Party membership" (R. p. 63). The Court went on to say (R. p. 64):

"If, in refusing, the employee injects his claim of privilege under the Fifth Amendment, that circumstance is incidental or additional. The dismissal is still proper for refusing that vital, fundamental information. Were that not so, this would be the result: An employee may be dismissed for refusing to give information as to whether or not he is a Communist party member (*Garner v. Los Angeles Bd., supra*), but if with his refusal he draws into or adds to his words of refusal a claim that to answer might tend to incriminate him and he, therefore, claims the privilege to refuse to answer under the Fifth Amendment to the United States Constitution, he may not be dismissed. That cannot be."

Appellant's argument throughout his brief, on a hypothesis of dismissal for pleading the Fifth Amendment is, thus, a misstating of the fact, a misstating of the holding of the Court of Appeals, and obscures the question presented on this appeal.

Demonstrating that appellant was dismissed for the refusal to answer the question as to Communist Party mem-

bership and not because he pleaded the Fifth Amendment is the Transit Authority's action in *Matter of Hehir v. New York City Transit Authority*, New York Supreme Court, Kings County Index No. 4071 (1956).^{*} *Hehir*, also an operating employee in the New York City Subway System, did not plead the Fifth Amendment when he refused to answer the question as to Communist Party membership. He, too, was dismissed for refusal to answer the question.

For the purpose of meeting the argument which appellant makes, based on his own formulated hypothesis of the ground for dismissal, we discuss the import of the Fifth Amendment and of a plea of the Fifth Amendment as delineated by this Court, notwithstanding that the question is not material on this appeal.

While no inference of guilt, of course, is to be drawn from the plea (and no such inference was drawn in this case, as the Court of Appeals said [Op., R. p. 63]), the "great value" of the privilege of the Fifth Amendment, as Chief Justice Warren said in *Quinn v. United States*, 349 U. S. 155, 162 (1955), is that it is a "'protection to the innocent though a shelter to the guilty' ". The plea absolves of the duty to answer a question and relieves of liability to punishment for contempt for refusal to answer, only if an answer might tend to incriminate (*Quinn v. United States*, *supra*, at p. 162; *Emspak v. United States*, 349 U. S. 190 [1955]). Therefore appellant's criticism (Br. p. 13) of the statement in the Appellate Division opinion in the instant case, that the court was required to and should accept as truthful appellant's statement that answers to the questions propounded might have tended to incriminate him, is unwarranted. The Appellate Division

^{*} Petitioner has asked the Court before which the case is pending not to proceed with its decision, awaiting the argument of the instant case.

statement is in accord with what this Court has declared to be the value of the plea and the permissible use of it.

The error of the concept of the Fifth Amendment as appellant argues it, is clear from the holding in *Ullmann v. United States*, *supra*, 350 U. S. 422, and the discussion of the Amendment in that opinion. From the enunciation of principle in that case, the following is derived: Essentially it is everyone's "duty to give testimony" before a body or officer authorized to hear testimony (cf. p. 439, footnote). The plea of the Fifth Amendment permits the withholding of testimony when to give it might expose to criminal prosecution. It is for this reason that this Court held in the case, that when the Immunity Act removed the possibility of prosecution, there was a requirement to testify, and the Fifth Amendment was thereby not violated. The Court so held notwithstanding that *Ullmann* argued that he would suffer (p. 430) "the impact of the disabilities imposed by federal and State authorities and the public in general—such as loss of job, expulsion from labor unions, State registration and investigation statutes, passport eligibility, and general public opprobrium". But Justice Frankfurter said that to satisfy the Fifth Amendment the immunity granted need only remove the danger of criminal prosecution (pp. 430-431).

Therefore assuming—purely *arguendo*—that the plea of the Fifth Amendment had any influence on the Transit Authority in adding to its doubt of appellant's trustworthiness and reliability, this was not violation of any constitutional right.

Mr. Justice Douglas in his dissenting opinion declared (p. 454):

"It is no answer to say that a witness who exercises his Fifth Amendment right of silence and stands mute

may bring himself in disrepute. If so, that is the price he pays for exercising the right of silence granted by the Fifth Amendment."

Therefore, once more assuming—purely *arguendo*—that the plea of the Fifth Amendment did influence the Transit Authority in adding to its doubt of appellant's trustworthiness and reliability, it would have been "the price he [appellant] paid for exercising the right of silence granted by the Fifth Amendment."

Appellant relied in the State Courts and relies here on the *Slochower* case (350 U. S. 551 [1955]). Obvious factors distinguish the instant situation from that involved in *Slochower*. Both the Appellate Division and the Court of Appeals found this to be so (App. Div. Op. R. pp. 40-43; Court of Appeals, Op. R. pp. 62-64).

The cardinal differences between the *Slochower* case and the present one may be summed up as follows:

1. This Court expressly held that the employing governmental unit has the right to ask questions of its employee to determine his fitness for employment, citing its decision in *Garner* (350 U. S., at p. 558). That is the present case.
2. The hearing at which city employee *Slochower* pleaded the Fifth Amendment was before a Committee of the United States Congress. That is *not* this case. This hearing was by employer, New York City Transit Authority, conducted for it by the Commissioner of Investigation of New York City.*

* The construction of the State statutes by its highest Court to the effect that the Transit Authority is a part of the State and City government covered by the Security Risk Law, and the Commissioner of Investigation of the City of New York is authorized to conduct in-

(Footnote continued on following page.)

The report in *United States Law Week* (24 U. S. Law Week, October 25, 1955, p. 3110, col. 3), of the oral argument in the *Slochower* case refers to Mr. Justice Frankfurter's comment in the course of the argument, that it makes a lot of difference whether a question is put by a United States Senator or by the city authorities.

3. The Congressional Committee questioning *Slochower* specifically announced that its inquiry was not directed at *Slochower's* conduct as a city employee. This is *not* this case. The hearing by Lerner's employer had one purpose only—to determine appellant's trust and reliability as its employee.
4. The *Slochower* case turns solely upon the validity of discharge pursuant to Section 903 of the New York City Charter, which was not concerned with the particular kind of official conduct as to which an employee refused to testify under the plea of the Fifth Amendment. This Court so treated it saying, (350 U. S. p. 558): "as interpreted and applied by the State Courts, it operates to discharge every city employee who invokes the Fifth Amendment. . . . No consideration is given to such factors as the subject matter of the

(Footnote continued from preceding page.)
 investigations for the Transit Authority will be regarded by this Court as conclusive upon it. *Barsky v. Board of Regents, supra*, 347 U. S. 412, (1954). Appellant's argument that because the purpose of the Security Risk Law is to protect the national security, the Commissioner of Investigation of the City of New York was acting as an agency of the federal government is so self-evidentially reasoning *reductio ad absurdum* that it is unnecessary to spell out the absence of logic in it. In any event the State Courts' holding was that the Commissioner was acting as agent of the Transit Authority, which is not an arm of the federal government, disposes of that argument.

questions." That is to say, this Court condemned Section 903 because it was the Fifth Amendment and that alone—no matter as to what subject—which caused automatic dismissal under it. That is *not* the present case. Section 903 of the New York City Charter is not involved. The concern of the New York Security Risk Law is completely different. Its concern is precisely with "the subject matter of the questions;" with determining fitness for security employment; with determining whether substantive reason exists which demonstrates the employee to be "of doubtful trust and reliability".

5. It was the summary dismissal by the employer under Section 903 of the New York City Charter without "inquiry" by the employer which this Court deemed lack of due process in the *Slochower* case. That is *not* this case. The employer here *did* make the "inquiry" of appellant. Appellant had four appearances before the Commissioner of Investigation acting on behalf of the New York City Transit Authority (R. pp. 10-15). He was advised of the provisions of the Security Risk Law and "given an opportunity to reconsider" his refusal to answer. On two of his appearances he appeared with counsel. He had 30 days after his suspension to submit statements or affidavits to show why he should be reinstated. In the letter of suspension he was given the reason therefor. He thus had the "charge being made against him" and the "opportunity to explain". He had the "charge" once more in the letter terminating his employment. He had the opportunity to appeal to the State Civil Service Commission pursuant to

Section 1106 of the Security Risk Law, with all of the added opportunities for further inquiry which such appeal affords, *supra* pp. 7-8.

POINT III

Appellant was not discharged for membership in the Communist Party. Accordingly, no question of the validity of a discharge on such ground is before the Court, and this Court, in keeping with its policy of refraining from reaching constitutional issues unless necessary, will not consider the question. Moreover, appellant's arguments on the subject are adverse to prior decisions by this Court and the principles on which they are based.

Appellant was not discharged as being a member of the Communist Party. The Court of Appeals so held (Op., R. p. 63). He was not discharged as or *undoubtedly* trustworthiness and reliability for refusing to answer the question as to Communist Party membership. He was discharged because he had by refusing to say whether he was a member created "doubt" as to his trustworthiness and reliability*.

Because appellant was not discharged for party membership, there is "not" before the Court "the question

* Appellant argues that there was no "evidence" presented justifying doubt of trustworthiness and reliability. Evidence in a case to support the decision may, of course, come from either side. In this case it came from appellant. The Security Risk Law (§ 1107) notes certain items of evidence upon which the determination of doubtful trust and reliability "may" be based but to which the employer and the State Civil Service Commission is not "limited" in reaching its determination. Appellant, by refusing to answer the basic question to which the employer had the right to have an answer from him, gave the "evidence" of doubtful trust and reliability upon which the Transit Authority reached its determination (Court of Appeals op., R. p. 64).

whether * * * [the employer] may determine that an employee's disclosure of such political affiliation justifies his discharge" (*Garner v. Los Angeles Board*, *supra*, 341 U. S. at p. 720). This is in accord with this Court's policy of not reaching questions of constitutionality until they are inescapable (*Peters v. Hobby*, 349 U. S. 331, 338 [1955]); in accord with its policy of refusing to "anticipate constitutional questions" or to decide "abstract constitutional issues" (*United States v. Auto. Workers*, 352 U. S. 567, 590, 591, 592 [1957]); in accord with its policy against passing upon the validity of statutory provisions "unless absolutely necessary to a decision of the case", *Burton v. U. S.*, 196 U. S. 283, 295" (*id.* p. 590)*.

Point IV of appellant's brief is composed of arguments he might have been constrained to make had he responded that he was a member of the Communist Party, and are, moreover, counter to principles enunciated by this Court in *Adler v. Board of Education*, *supra*, 342 U. S. 485, *American Communications Association v. Douds*, *supra*, 339 U. S. 382, among other cases.

Again, because the question of membership in the Communist Party is not in issue, the question of the element of knowledge of the purposes of the Communist Party on the part of one who conceded membership therein would not be considered by the Court in this case. Since appellant discussed it, we would merely refer to the Feinberg

* Since the ground of dismissal in this case was refusal to answer the question as to Communist Party membership and since this ground warranted the discharge, the Court will therefore also not reach the questions of constitutionality appellant raises (Br., Point III) because the Transit Authority's resolution terminating appellant's employment mentioned that there were other activities on appellant's part which gave reasonable ground for belief that he was not a good security risk.

Law, upheld in *Adler v. Board of Education, supra*, where *scienter* was also not required by the language of the statute. But the Court of Appeals of New York construed the law as requiring it (301 N. Y. 476, 494 [1950]). It is to be presumed that to avoid unconstitutionality (*Peo. v. Bradley*, 207 N. Y. 592, 610-611 [1913]) the State Courts of New York will construe this law as requiring *scienter*. The question of *scienter* in the Security Risk Law has not been before the Court of Appeals of New York, because the instant case is the only one involving the Security Risk Law which has reached that Court, and the question of membership in the Party is not in this case. This Court, in keeping with its policy, will not pass upon the question until the State Court has had the opportunity to do so. (*Adler v. Board of Education, supra*, 342 U. S. at p. 496.)

Conclusion

The issue in this case is the single one we have stated. Appellant has, in his brief, said many things which we have refrained from answering in the interest of not submitting a brief constituted of a chain of rejoinders on subjects and propositions of constitutional law which have no bearing on this case. We have limited ourselves to the question presented on this appeal, and to responding to theories appellant has particularly pressed, notwithstanding that they are in fact not relevant to this case.

There is nothing in the Security Risk Law, certainly nothing in those provisions of the law involved in this case or the application of it in this case, which raise any issues of freedom of speech, belief, assembly or association.

The principles upon which the issue in this case turns are those we have reviewed in Point I, A. *supra*, and

which this Court has applied within recent years in cases which raised like issues.

The decision of the Court of Appeal raises no Federal question which this Court has not already decided, and with which the Court of Appeals decision is not in accord and harmony.

The decision of the Court of Appeals should be affirmed.

Dated: February 21, 1958.

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1957

No. 165

MAX LERNER, *Appellant*,

vs.

HUGH J. CASEY, WILLIAM G. FULLEN,
HARRIS J. KLEIN, *et. al.*

APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

**BRIEF FOR NEW YORK CIVIL LIBERTIES UNION,
AMICUS CURIAE**

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INDEX

	PAGE
INTEREST OF NEW YORK CIVIL LIBERTIES UNION AS <i>Amicus Curiae</i>	1
FACTS	3
ISSUES TO BE ARGUED BY <i>Amicus</i>	4
I—The New York Security Risk Law, as Construed by the Court of Appeals, Is in Violation of Due Process of Law,	5
II—Appellant's Discharge, Based Solely on His Invocation of the Privilege Against Self-Incrimination, was "Arbitrary Action"	13
CONCLUSION	16

CASES CITED

Adler v. Board of Education, 342 U. S. 485	6
Chastleton Corp. v. Sinclair, 264 U. S. 543, 547-548	5
Cole v. Young, 351 U. S. 536, at pp. 546-537	12
Cole v. Young, 351 U. S., at pp. 546-547	13
Duncan v. Kahanamoku, 327 U. S. 304	9
Fitzgerald v. City of Philadelphia, Penn. Comm. Pleas Court, No. 6212, Sept. Term, 1952, "New York Times," May 5, 1953, aff'd 376 Pa. 379, 102 A. 2d 887	9fn
Fitzgerald v. Sperry Gyroscope Co., 22 L. A. 186, aff'd 283 App. Div. 1036	9fn

	PAGE
Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 10-11	5
Herndon v. Lowry, 301 U. S. 242, 258	7
Hughes v. Board of Education, 309 N. Y. 319	6
Parker v. Lester (9 Cir.), 227 F. 2d 708	10, 11
Peters v. Hobby, 349 U. S. 331	13
Slochower v. Board of Education, 350 U. S. 551	4, 8, 14, 15
Sperry Gyroscope Co. v. Engineers Association, 106 N. Y. S. 2d 597, 599, rev'd on other grounds, 278 App. Div. 630, aff'd 304 N. Y. 582	9fn
Thomas v. Collins, 323 U. S. 516, 530	7
Wieman v. Updegraff, 344 U. S. 183, 192	8, 13

STATUTES CITED

N. Y. Civil Service Laws, §12-a	6
N. Y. Uncon. Laws:	
§1106	7
§1107(d)	6, 7
§1108	6

PAGE

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- Jahoda and Cook, "Security Measures and Freedom of Thought," 61 *Yale L. J.* 295, 300-301 10fn
- Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 181-182 9fn
- Laswell, "National Security and Individual Freedom," 23-75 (1950) 9
- "Loyalty in a Democracy," Public Affairs Pamphlet No. 179 (New York, 1952), at p. 6 10fn
- "Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York," 141-149 (1949) 13

IN THE
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HARRIS J. KLEIN, *et al.*

APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

**BRIEF FOR NEW YORK CIVIL LIBERTIES UNION,
*AMICUS CURIAE***

**Interest of New York Civil Liberties Union as
*Amicus Curiae***

The New York Civil Liberties Union is submitting this brief with the written consent of both parties, filed with the Clerk of this Court. An affiliate of the American Civil Liberties Union, it is a non-partisan organization devoted solely to the protection and advancement of the constitutional liberties of the individual in situations arising in

New York City and its environs. Its exclusive concern is civil liberties; it has no other platform or program, political, economic, or otherwise.

The Union is concerned with the instant case because discharges from state employment on the basis of suspected beliefs and associations spread fear of the consequences of freely expressing opinions and freely associating, thus curtailing the exercise of vital First Amendment rights. Under the New York Court of Appeals' interpretation of New York's Security Risk Law, suspicion, fear and constraint are spread throughout all areas of state and city employment without regard for the Law's intended purpose of safeguarding security. Indeed, the application of the State Security Risk Law by the Court of Appeals to an employee whose "primary duties consisted of opening and closing subway car doors to permit the entrance and exit of passengers" (R. 6) finds no justification in the interest of "the security or defense of the nation and the state." Rather, it is destructive of the very interest sought to be protected. In our tradition liberty and security are complimentary, not opposing ideas. "Security is gained through liberty, rather than in opposition to it."¹ Moreover, a discharge from state or city employment based solely on the invocation of the privilege against self-incrimination is unfair, arbitrary and unreasonable. It is an abridgment of the important protection the privilege gives the individual against oppression and injustice.

¹ *Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York*, 27 (1956).

Facts

Max Lerner, the appellant, was a subway conductor in the New York City transit system for nineteen years, most recently as an employee of the New York City Transit Authority (R. 6). During this period he performed his work to the satisfaction of the Transit Authority and the prior operators of the transit system (R. 6). On September 14, 1954 he was directed by his immediate superior to proceed to the office of the New York City Commissioner of Investigation. There, a deputy commissioner told him that he must answer questions "in an investigation," not more specifically defined, and that his failure to comply would cause his dismissal under §903 of the New York City Charter (R. 6-7). Lerner was then sworn and asked whether he was a member of the Communist Party (R. 10, 11). He declined to answer, relying upon his constitutional privilege. A similar inquiry and refusal occurred on October 8, 1954 when he appeared with counsel. The Deputy Commissioner refused to state whether charges had been made against him, but said that the inquiry was made under the State Security Risk Law (R. 6, 10-11). He was never furnished specifications or evidence to support a charge that he was or had been a Communist, or that, in any manner, "reasonable grounds exist for the belief that, because of doubtful trust and reliability [his] employment . . . in a security position or in a security agency would endanger the security or defense of the nation and the state" (R. 7-8). Nor did he ever receive a hearing in which evidence of any kind was presented against him (R. 9).

On October 21, 1954 appellant was suspended under the Security Risk Law on the sole ground of his reliance on

his constitutional privilege. He was given a thirty-day period in which to submit statements or affidavits in his own behalf. In the absence of specific charges and there being no dispute as to the assertion of the privilege, he made no submission (R, 10-11). Appellant was discharged from employment on November 24, 1954, because "upon all the evidence, reasonable grounds exist for belief that because of his doubtful trust and reliability, the employment of Max Lerner in the position of conductor endangers the security or defense of the nation and state" (R, 14-15). It is undisputed that in the position from which he was discharged Lerner's "primary duties consisted of opening and closing subway car doors to permit the entrance and exit of passengers, together with certain routine duties incidental thereto" (R. 6).

Issues to Be Argued by *Amicus*

We think it clear that the New York Security Risk Law, as applied to appellant by the holding of the Court of Appeals, was patently arbitrary and in violation of the due process clause of the Fourteenth Amendment, and that the discharge of a subway conductor whose primary duties consist of "opening and closing subway car doors" on the sole ground of his invocation of the privilege against self-incrimination was "arbitrary action" within the meaning of this Court's ruling in *Slochower v. Board of Education*, 350 U. S. 551.

The New York Security Risk Law, as Construed by the Court of Appeals, Is in Violation of Due Process of Law.

Under the "due process clause" it is well established that when a state undertakes to regulate what it is free to regard as a public evil, it may adopt such measures having a reasonable relation to that end as it may deem necessary in order to make its action effective. Putting to one side the question whether New York may, absent the element of *scienter*, constitutionally discharge a civil servant because of membership in the Communist Party, it is clear that if the New York Security Risk Law, as applied to appellant, bears no substantial relation to its purported objective of safeguarding "the security or defense of the nation and the state," the statute must fall. In short, if New York was not reasonably warranted in its conclusion that the retention in employment of a subway conductor of doubtful trust and reliability (occasioned by his invocation of the privilege against self-incrimination when asked whether he was a member of the Communist Party) would endanger the security or defense of the nation and the state, the statute cannot withstand a "due process" challenge. See *e.g.*, *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 10-11, *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 547-548.

This Court will note that New York specifically requires that no state or city employee may be employed or retained in employment if he is, or becomes, a member of an organization which advocates the overthrow of the Government of the United States by violence or unlawful means.

N. Y. Civil Service Laws, §12-a. This statutory provision, in force since 1939, is applicable to the employees of each and every agency of the City and State of New York. See, *Hughes v. Board of Education*, 309 N. Y. 319. Moreover, under §22 of the New York Civil Service Law an employee may be removed for cause after charges and hearing in accordance with the procedural requirements therein set forth. However, in *Adler v. Board of Education*, 342 U. S. 485, this Court recognized that §12-a of the New York Civil Service Law requires (1) a finding of *scienter* before an employee can be disqualified by reason of membership in a proscribed organization; (2) that the order of disqualification be supported by a fair preponderance of the evidence; (3) that the disqualified employee be permitted court review under the rules of evidence; and (4) that the burden of proof is upon the official seeking to sustain the order of disqualification. *Id.*, at pp. 494-496.

In contrast, the New York Security Risk Law authorizes the dismissal of state and city civil servants by reason of constitutionally protected activities and associations. There is no requirement that there be a finding as to *scienter*; mere "membership in any organization or group found by the State Civil Service Commission to be subversive" is sufficient (*N. Y. Uncon. Laws*, §1107(d)). The State Civil Service Commission is not required to base its determination as to whether an organization or group is "subversive" upon evidence developed in hearings conducted by it; it is permitted to rely on the findings of other agencies, state and federal (*N. Y. Uncon. Laws*, §1108). There is no provision for court review under the rules of evidence, or any other rules, as the findings of the State Civil Service Commission are conclusive and final, and not subject to review

in any court (*N. Y. Uncon. Laws*, §1106). Dismissal proceedings are not restricted by the rules of evidence or the procedure prevailing in the courts, and a finding of doubtful trust and reliability authorizing discharge

“may be based upon evidence of the previous conduct of the applicant, eligible, officer, or employee, as the case may be, which may include to the extent deemed appropriate, but shall not be limited to evidence of (a) previous unauthorized disclosure of confidential information; (b) the commission or attempt to commit an act or acts designed to or tending to undermine, sabotage, hamper or obstruct a program adopted by the agency or department by which he is employed or which affects the security or defense of the nation and the state; (c) treasonable or seditious conduct; and (d) membership in any organization or group found by the state civil service commission to be subversive.” *N. Y. Uncon. Laws*, §1107.

This statute's wholesale invasion of Lerner's constitutional rights can be justified, if at all, only by a clear public interest, threatened—not doubtfully or remotely—but clearly and immediately. See, *Thomas v. Collins*, 323 U. S. 516, 530. A rational connection between the legislative remedy and the evil sought to be curbed, which in other contexts might support legislation against “due process” attack, will not suffice here. See, *Herndon v. Lowry*, 301 U. S. 242, 258. But in any event, not only is New York's restriction of appellant's liberties unjustified by any clear public interest, immediately threatened,—there is no rational or any other connection between the remedy provided by the statute (as construed below) and the safeguarding of “the security or defense of the nation and the state.”

The holding of the Court of Appeals sustaining respondents' decision to discharge Lerner in the name of a reason which simply did not apply to a civil servant whose "primary duties [consist] of opening and closing subway car doors" was patently arbitrary in the very sense of this Court's holding in *Wieman v. Updegruff*, 344 U. S. 183, 192.

The Court of Appeals held Lerner's dismissal valid, stating that if he "were a member of the Communist conspiracy he would, as an employee of the transit system in charge of a train, as conductors are, be a very real threat to the State and to the City" (R. 61). How, the Court of Appeals did not state. This suggestion was as irrelevant as it was bizarre. Lerner was not discharged with being a saboteur, and as such he could have been no more dangerous to the New York City transit system than a private citizen who has the price of a subway token. The only way appellant could have constituted a threat to the security of the state and city was if he intentionally sabotaged the subway system in time of emergency. In other words, if Lerner were disloyal, there was an exceedingly remote possibility that he might cause panic in the subway system during an air raid in New York. But respondents concede that there is no suggestion as to Lerner's disloyalty. They suggest only that he may be of "doubtful trust and reliability" because he invoked his constitutional privilege to refuse to answer the question whether he was a member of the Communist Party (R. 63). And this Court has condemned "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." *Slochower v. Board of Education*, 350 U. S. 551, 557.

The problem of personnel security where an employee may in fact have access to secrets, or be able to influence policy against the interests of his own country, is real,² and we do not minimize the government's difficulty in handling it. But the problem of balancing the demands of "security" and the "rights of the individual citizen" has always plagued government officials. See, *Duncan v. Kahanamoku*, 327 U. S. 304. The hypothetical situation enunciated by the Court of Appeals adopts the concept of "total security," and thus rejects the very essence of the "security or defense of the [United States] and the state," embracing instead the security concept of some totalitarian government. See, Laswell, *National Security and Individual Freedom*, 23-75 (1950). According to Miss Eleanor Bontecou, perhaps the leading writer in the field:

"The security question arises and the judgment on it is made only in connection with positions which are classed as 'sensitive'; that is, where an employee may in fact have access to secrets, or be able to influence policy against the interests of his own country. A security judgment is a relative one. Some positions are more sensitive than others, and the more important the secret to which an employee may have access the stricter must be the tests applied." *"The Federal Loyalty-Security Program"* 48-49 (1953).³

² See, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 181-182 (Douglas, J., concurring).

³ See also: *Fitzgerald v. Sperry Gyroscope Co.*, 22 L. A. 186, aff'd 283 App. Div. 1036; *Sperry Gyroscope Co. v. Engineers Association*, 106 N. Y. S. 2d 597, 599, rev'd on other grounds, 278 App. Div. 630, aff'd 304 N. Y. 582; *Fitzgerald v. City of Philadelphia*, Penn. Comm. Pleas Court, No. 6212, Sept. Term, 1952, "New York Times," May 5, 1953, aff'd 376 Pa. 379, 102 A. 2d 887. The non-

While there is no question that a disloyal employee whose work involves classified data, the formulation of a foreign policy, or who is somehow situated so as to work a particular leverage to do harm to the nation or community, is a "security risk," a subway conductor whose job consists of opening and closing subway doors, and who invokes his privilege against self-incrimination when asked whether he is a member of the Communist Party, presents no rational risk to the safety of either the nation or the state. Mr. Justice Steuer, of the New York Supreme Court, put it this way:

"It is a bit difficult to visualize how a wash room attendant in his official capacity can give aid to his country's enemies." *Application of Pinggera*, 206 Misc. 615, 134 N. Y. S. 2d 166, 168.

If Lerner were disloyal, it is conceivable that he might cause harm to the New York City transit system in time of emergency, but so could any one of millions of residents of the City of New York who ride the subway system daily. The hypothetical fear of New York's Court of Appeals was completely rejected in *Parker v. Lester* (9 Cir.), 227 F. 2d 708, where the Ninth Circuit stated:

judicial authorities are in accord: Bortecou, *supra*, at pp. 48-49; Brown, "The Operation of Personnel Security Programs," *ANNALS, American Academy of Political and Social Science* (1955), pp. 77-78; Goldbloom, "American Security and Freedom" (New York, 1954), pp. 32-34; "Loyalty in a Democracy," *Public Affairs Pamphlet No. 179* (New York, 1952), at p. 6; Emerson and Helfeld, "Loyalty Among Government Employees," 58 *Yale L. J.* 1, 136-137; Jahoela and Cook, "Security Measures and Freedom of Thought," 61 *Yale L. J.* 295, 300-301; XI, *Bull. of Atom. Scientists*, April, 1955, pp. 110-11, 121, 146, 163.

"It cannot be said that in view of the large problem of protecting the national security against sabotage and other acts of subversion we can sacrifice and disregard the individual interest of these merchant seamen because they are comparatively few in number. It is not a simple case of sacrificing the interests of a few to the welfare of the many. In weighing the considerations of which we are mindful here, we must recognize that if these regulations may be sustained, similar regulations may be made effective in respect to other groups as to whom Congress may next choose to express its legislative fears. No doubt merchant seamen are in a sensitive position in that the opportunities for serious sabotage are numerous. If it can be said that a merchant seaman notwithstanding his being on board might sink the ship loaded with munitions for Korea, it is plain that many persons other than seamen would be just as susceptible to security doubts. The enginemen and trainmen hauling the cargo to the docks, railroad track and bridge inspectors, switchmen and dispatchers, have a multitude of opportunities for destruction. Dangerous persons might infiltrate the shipping rooms of factories where the munitions are being packed for shipment to Korea with opportunities for inserting bombs appropriately timed for explosion on board ship. All persons who are in factories making munitions and material for the armed forces have opportunities for sabotage, and the same may be said of all operators of transportation facilities, not to mention workers upon the docks. * * * In the event of war we may have to anticipate Black Tom explosions on every waterfront, poison in our water systems, and sand in all important industrial machines. But the time has not come when we have to abandon a system of liberty for one modeled on that of the Communists. Such a system was not that

ordained by the framers of our Constitution. It is the latter we are sworn to uphold." *Id.*, at p. 721.

It is because the "security or the defense of the [United States] and the state" weighs "individual rights" in relation to the "national safety" that this Court held that the term "national security" as used in Public Law 733, 81st Congress, "was intended to comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion and foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare. * * * There is an obvious justification for the summary suspension power where the employee occupies a 'sensitive position' in which he could cause serious damage to the national security. * * * On the other hand, it is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in 'sensitive positions' and who are thus not situated where they could bring about any discernable adverse acts on the Nation's security. In the absence of an immediate threat of harm to the 'national security' the normal dismissal procedures seem fully adequate and the justification for summary powers disappears. We will not lightly assume that Congress intended to take away [procedural] safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets." See, *Cole v. Young*, 351 U. S. 536, at pp. 546-547.

Since respondents can advance no rational explanation, as to how a subway conductor who invokes his constitutional

privilege when asked whether or not he was a member of the Communist Party can endanger the "security or defense of the nation and the state" (as distinguished from the "general welfare"), New York's Security Risk Law, as construed by the Court of Appeals, is patently arbitrary and capricious. See, e.g., *Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York*, 141-149 (1958). The importance of the prohibition against arbitrariness is particularly emphasized in the case of public servants discharged as "security risks." In *Wieman v. Updegraff*, 344 U. S., at p. 191, and in *Cole v. Young*, 351 U. S., at pp. 546-547, this Court noted the deep and lasting stigma attaching to persons dismissed from public service for such reasons. In *Peters v. Hobby*, 349 U. S. 331, it stated that "substantial rights affecting the lives and property of citizens are at stake." *Id.*, at p. 347. They are at stake here, too.

II

Appellant's Discharge, Based Solely on His Invocation of the Privilege Against Self-Incrimination, Was "Arbitrary Action."

The dissent of Judge Fuld in the Court of Appeals points out that the Security Risk Law imposes no absolute duty upon state or city employees to answer questions relating to their official conduct as a condition of retention in employment, but authorizes dismissal only upon "evidence that the particular officer or employee" is of such "doubtful trust and reliability" as to endanger the "security" or "defense" of the nation and the state. "The

narrow issue here presented; therefore, is whether the appellant's exercise of his constitutional right to remain mute may serve as the basis for inferring the existence of the facts prescribed by the statute as a condition of discharge" (R. 67).

This case does not present the question whether the invocation of the privilege against self-incrimination prohibits the federal or state government from discharging a public servant from a position in which he has access to classified defense information, or where he can influence policy against the interest of his own country, or where he can assert some serious leverage in aid of his country's enemies. This case involves an employee whose primary functions consist of opening and closing subway doors. While we would assert that no inference of doubtful trust and reliability can arise from the invocation of the privilege in any circumstances, that question is not presented here. The question presented is whether the state can transform the exercise of a constitutional privilege into an admission of guilt merely because it arbitrarily asserts that the "security or defense of the nation and the state" is involved.

In *Slochower v. Board of Education*, 350 U. S. 551, this Court was careful to point out that the state has broad powers in the selection and discharge of its employees, and that it may be that proper inquiry would show that Slochower's continued employment was inconsistent with the real interests of the state, "but there has been no such inquiry here." *Id.*, at p. 559. In the case at bar Lerner was found to be "of doubtful trust and reliability," if not actually disloyal, only because he refused to answer questions re-

lating to his possible association with a subversive organization. The dissent of Judge Fuld in the Court of Appeals points up the heavy hand with which this statute was applied to appellant:

"Whether, however, the refusal be taken as an admission of his membership in such organization or merely as engendering a doubt as to his reliability, the fact remains that in either instance an adverse, 'sinister' inference, fraught with serious consequences, is attempted to be drawn from the invocation of the constitutional privilege. Based as it was solely upon his exercise of the privilege, the appellant's discharge constitutes 'arbitrary action' within *Slochower*, regardless of the formal difference in the labels employed. Any other conclusion would be strange indeed: to treat reliance upon a fundamental constitutional guarantee as proof of 'untrustworthiness and unreliability' is anomalous, a veritable contradiction in terms. * * * There is ever a need to achieve a balance between government security and the traditional rights of the individual. That balance has been destroyed by the way in which the statute before us has been applied. It is a delusion to think that the nation's security is advanced by the sacrifice of the individual's basic liberties. The fears and doubts of the moment may loom large, but we lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees." (R. 69)

We think it clear that New York's "Security Risk Law" as construed by the court below, is interdicted by this Court's holding in *Slochower v. Board of Education, supra*.

CONCLUSION

By reason of the foregoing, the decision of the Court below should be reversed.

Respectfully submitted,

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Office - Supreme Court, U.S.

FILED

AUG 14 1958

JOHN T. MEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 63.

BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA

v.

HERMAN BEILAN,

Petitioner.

No. 165.

MAX LERNER,

Petitioner.

v.

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J.
KLEIN, HENRY K. NORTON and DOUGLAS M. MOF-
FAT, Constituting the New York City Transit Authority.

PETITION FOR REHEARING.

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MOFFAT, CONSTITUTING THE NEW YORK CITY TRANSIT
AUTHORITY.**

PETITION FOR REHEARING.

*To: The Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Petitioners pray that this Court grant rehearing of its
decisions of June 30, 1958, affirming the judgments below.

REASONS FOR GRANTING REHEARING.

In the petition for certiorari in No. 63 and the jurisdictional statement in No. 165, petitioners requested this Court to grant hearings in these cases for the purpose of clarifying the import of certain of its previous decisions regarding the rights of public employees with respect to association and belief. With deference, we submit that the majority opinions in these cases have failed to achieve that clarification and further have introduced additional confusion on these important matters.

The previous decisions in *Garner v. Los Angeles Board of Public Works*, 341 U. S. 716, and *Gerendt v. Board of Supervisors*, 341 U. S. 56, in contrast with the principles announced in *Wieman v. Updegraff*, 344 U. S. 183, *Slochower v. Board of Higher Education*, 350 U. S. 551, rehearing denied, 351 U. S. 944, and *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, had at least established that the lawful associations of public employees could not be made the basis for their dismissal without certain prerequisites if due process was to be served. The concept of "scienter" introduced in these cases at least gave protection to presumptively innocent association. In addition, clearly-drawn pre-existing legislation making disclosure a condition of employment added certain guaranties of fairness in the dismissal procedures.

While the instant cases were pending in this Court, five other decisions appeared to lend support to petitioners' view of the teaching of the prior decisions. They were *Konigsberg v. State Bar of California*, 353 U. S. 252, *Schware v. Board of Bar Examiners*, 353 U. S. 232, *In re Patterson*, 353 U. S. 952, *Morgan v. Ohio*, 354 U. S. 929, and *Raley v. Ohio*, 354 U. S. 929. In those cases, particularly *Konigsberg*, this Court declared it improper to draw an inference of lack of good moral character from one's colorable assertion of a constitutional right against ques-

tioning about his associations and beliefs. In addition, the *Patterson* and *Schware* decisions seem to indicate that even had there been affirmative answers to questions regarding Communist Party association, the evidence thereby disclosed would not have justified refusal of state licensing. These decisions cannot be squared with the majority and concurring opinions in *Lerner and Beilan*.

Beilan and *Lerner* have introduced an entirely new concept into the relationship between states and their employees—an obligation of frankness whose application to these cases entirely overrides previous requirements with respect to *scienter* and pre-existing disclosure statutes. This overriding obligation has been permitted to short-circuit previously established rules regarding fair warning and knowing association. Furthermore, the *Konigsberg* prohibition of improper inferences has, as though by magic, been replaced by the Court's approval of the doctrine of "equating" failure to answer with incompetency or unreliability. The consequence of these decisions is that although California may not "infer", New York and Pennsylvania may "equate". Although California's impermissible inferences did not overcome *Konigsberg's* attempt to prove his good moral character, nevertheless Pennsylvania's and New York's equation satisfies those states' burden of proving *Beilan's* and *Lerner's* incompetency and unreliability.

The purported distinction of *Konigsberg* is particularly perplexing. The Court says that that case "stressed the fact that the action of the State was not based on the mere refusal to answer relevant questions—rather, it was based on the inference impermissibly drawn from the refusal." This is entirely true, but the *Konigsberg* case dealt with whether the testimony of an ex-Communist about his attendance at meetings, his criticism of certain public officials and his refusal to answer questions, taken altogether, would suffice so to undermine *Konigsberg's* showing of good moral character as to disqualify him for admission to the Bar. It

seems to be hardly an appropriate distinction to say that whereas all three such things were insufficient in *Konigsberg*, one merely is enough in the present cases, not simply to cast doubt upon good moral character, but affirmatively to sustain the employer's burden of proving bad character. If this is a distinction of *Konigsberg*, we can only suggest it has swallowed the rule.

The nub of the majority opinions in both *Lerner* and *Beilan* is that refusal to answer "relevant" questions amounts to unreliability and incompetency. This reasoning is squarely contradictory to the rulings in *Wieman* and *Konigsberg*. In all four cases, the assertedly relevant questions involved lawful past associations. In *Wieman* a statute required the disclosure; that may be inferentially true of *Konigsberg*. There is no such statute involved in *Beilan* or *Lerner*.

One further consequence of these holdings opens up new dangers for public employees and their associations, that is, that in each case the Court permits state authorities deliberately to ignore other clearly applicable existing state procedures which guarantee at least fundamental fairness to the state employees. These existing statutes both in Pennsylvania and New York are now for practical purposes a dead letter. It appears to us that all of the things that have now been condemned in previous decisions are permitted in these cases simply in the name of candor and frankness.

Even *Garner* did not go this far. For in *Garner* there was a pre-existing law making the disclosure a condition of employment. In *Garner*, as interpreted by this Court and subsequently by California, the questioning was required to relate to knowing subversive association. The instant cases extend the *Garner* principle of conditioned employment beyond the necessities of any legitimate state interest and represent a far greater invasion of at least presumptively lawful association of state employees beyond the tolerance of the First and Fourteenth Amendments.

If the present decisions be regarded as a logical consequence of the *Garner* doctrine, then we suggest that that case itself needs reconsideration. In *Garner*, this Court upheld "inquiry as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are no less relevant in public employment." 341 U. S. 720.

This principle ought to be reconsidered because, we submit in all deference, it is logically unsound, unsupported by any principal of law and has had most deleterious effects upon the civil service and upon the rights of political association and privacy. It is our belief that the qualifications of public employees ought to be determined upon strictly relevant tests of their ability to perform and the actual performance of their work. See *Scholl v. Bell*, 125 Ky. 750, 102 S. W. 248; *Souder v. City of Philadelphia*, 305 Pa. 1, 156 Atl. 245; *Canteline v. McClellan*, 282 N. Y. 166. Even if inquiries beyond those matters may be treated as relevant, nevertheless such relevance must yield to the rights of privacy, of political association and of expression (*Sweezy v. New Hampshire*, 254 U. S. 234).

In addition to the confusion created on the issues of pre-existing statutes, fair procedures and scienter, as well as the erosion of previously established principles of free association and privacy, there is one further area of confusion created by the instant decisions. *Wieman* and *Joint Anti-Fascist Refugee Committee* had seemed to us to have established that discharge for refusal to answer a question relating to Communist association created a stigma of disloyalty and hence that due process required a hearing on the issue of loyalty prior to dismissal. The Court now holds that the state can avoid such requirements of due process by discharging a man for the same reasons but calling it

incompetency, unreliability or lack of candor. We doubt that the Court upon further reflection would agree with the proposition upon which these cases now stand, namely, that the use of a label can permit the State to dispense with what otherwise would be regarded as the requirements of due process.

We urge reconsideration of a doctrine whose effects are already being felt in different areas. The Coast Guard has already received judicial approval for the avoidance of the due process requirements of *Lester v. Parker*, 235 F. 2d 789 (9 Cir. 1956) by the imposition of a loyalty questionnaire upon persons seeking employment in the privately owned merchant marine (*Graham v. Richmond*, CADC No. — (Holtzoff, J., pending on appeal). The Florida Supreme Court has indicated that it is considering whether this Court's decisions herein may not justify the disbarment of a lawyer who refused to answer similar questions in the course of disciplinary proceedings (*Sheiner v. Florida*, — Fla. —). The United States Army, notwithstanding this Court's decisions in *Abramowitz v. Brucker* and *Harmon v. Brucker*, 355 U. S. 579, is employing the same questionnaire technique today.

Certainly before this Court's decisions become so fixed that they will mold judicial and administrative behavior throughout the United States with such adverse effects upon the rights of privacy and association, a full reevaluation of the legal philosophy underlying the doctrine, and its consequences, is justified in the public interest.

JOHN ROGERS CARROLL,

Counsel for Petitioner in No. 63.

LEONARD B. BOUDIN,

Counsel for Petitioner in No. 165.

August 12, 1958.

Petition for Rehearing

7

I, John Rogers Carroll, do hereby certify that I am counsel for the respondent in No. 63 and that this petition for rehearing is presented in good faith and not for delay.

JOHN ROGERS CARROLL

August 12, 1958.

I, Leonard B. Boudin, do hereby certify that I am counsel for the respondent in No. 165 and that this petition for rehearing is presented in good faith and not for delay.

LEONARD B. BOUDIN

August 12, 1958.